

Jacob (Giles) J. K.
EVERY MAN

His own Lawyer:

O R,

A Summary of the LAWS of *England* in a New and Instructive Method, under the following Heads,

V I Z.

- | | |
|---|---|
| I. Actions and Remedies, Writs, Process, Arrests, and Bail. | V. Liberty of the Subject, <i>Magna Charta</i> , <i>Habeas Corpus</i> , and other Statutes. |
| II. Courts, Attornies and Solicitors, therein, of Juries, Witnesses, Trials, Executions, &c. | VI. King and his Prerogative, the Queen and Prince, Peers, Judges, Sheriffs, Coroners, Justices of Peace, Constables, &c. |
| III. Estates and Fortunes in Lands and Goods, and how acquired; Ancestors, Heirs, Executors and Administrators. | VII. Publick Offences, Treason, Murder, Felony, Burglary, Robbery, Rape, Sodomy, Forgery, Perjury, &c. And their Punishment |
| IV. Laws relating to Marriage, Bastardy, Infants, Idiots, Lunaticks. | |

So plainly treated of, that all Persons may be fully acquainted with our COMMON and STATUTE LAW; and that, as well in Cases Civil as Criminal, and know how to protect themselves and their Property,

IN EVERY CIRCUMSTANCE WHATSOEVER.

The Tenth Edition, corrected and improved, with many Additions, from the Reports of Sir *James Burrow*, Sir *William Blackstone*, *Douglas*, *Cowper*, and Messrs. *Durnford* and *East*, and from the Statutes, down to 27 *Geo. III.* inclusive, including a Chronological Table of all Offences, both Capital and not Capital, by that Law.

L O N D O N:

Printed by A. STRAHAN, and W. WOODFALL, Law-Printers to the King's Most Excellent Majesty;

For J. F. and C. RIVINGTON, T. LONGMAN, W. RICHARDSON, G. G. J. and J. ROBINSON, R. BALDWIN, W. GOLDSMITH, J. BEW, T. WHIELDON, T. LOWNDES, SCATCHERD and WHITAKER and E. NEWBERRY.

M.DCC.LXXXVIII.

P R E F A C E.

GILES *Jacob*, the original Compiler of this Treatise, was the son of a considerable maltster, at *Rumsey*, in the county of *Southampton*, and bred up to the law, under a very eminent attorney; after his professional admission, he appears to have had good practice, and reputation, in his time; having been steward to several lords of manors, to one of whom, *viz. Thomas Lord Viscount Gage*, this Treatise is inscribed; every edition of which is ushered into the world, with a dedication, addressed to his Lordship: but to the present, we have not thought it necessary to be prefixed, in that it contains nothing more than the usual adulatory emanation of language, fraught with fulsome compliments to a patron; this dedication is followed by a Preface, wrote by the same pen, and conceived in the following terms:

“In an age of inquiry into things, it is not to be admired, that our great legislators should make many new laws, well intended for redressing publick evils, however short, they may fall of it, in the general execution of them: for there is hardly any fence so strong, but the fertile genius of the present times, by its inventions and stratagems, will easily break through it.

“But I do not here pretend to be a particular advocate, either for or against the alteration of our laws, *any further than as it makes new books (1) necessary*; what I shall now attempt, is to introduce an instructive treatise, writ in the easiest method, and adapted to every capacity, whereby the unskilful, and those who are ignorant in practice of the law, may in some measure be their own advisers, and readily avoid the common errors, too often happening, in the prosecution of suits.

“And in this treatise is contained the most useful and requisite learning in the law, for all degrees of persons to acquire and understand, there being likewise many curious things therein, not to be found in any other

(1) See note (3) in p. vi.

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one law book ; so that I may venture to say, the publick will here reap benefit and security to themselves, and at the same time, attornies and solicitors confess, it affords a very just instruction.

“ Nor will these gentlemen, I hope, make any objection to the popularity of my title, since this work is not designed to defame or abate the profession of the law, though it gives some light into it to the ordinary reader.”

Pope the poet, hath endeavoured to stigmatize *Jacob*, by characterizing him, in “ *The Dunciad*,” — “ *The BLUNDERBUSS of the Law*,” in allusion, I presume to the (1) *heaviness* of his publications, but, to keep up the metaphor, some (2) of them were of *good report*, and among such, we may include the following work, if having undergone NINE

(1) In the notes to “ *The Dunciad*,” another reason is assigned for the appellation, not at all according with ours ; but the same not being relevant here, the reader is referred to Book III. lines 149, 150.

(2) *Jacob*’s publications in the law, amount to no less than twenty-six ; the particulars of which, as to price and size, may be seen in the “ *Bibliotheca Legis*” ap. *Brooke*. However, notwithstanding such laborious studies, *Jacob* amused himself with poetry ; see the authorities, in the references, to our preceding note.

editions, authorises us to pronounce on the reception given it, in the world.

We have reason to believe, the original edition came out, soon after the legislature was pleased to command, all law proceedings to be in *English*: the precedents therefore of writs, declarations, and deeds, whether we consider them, as some of the *first attempts of professional, nay national* (3) *disgrace*

(3) The abrogating the court-hand, in which the judicial records of this country were engrossed, may be added to that disgraceful æra 4 Geo. II. (the year wherein the bill for translating the *Latin* proceedings, into *English*, or, as the event justifies, *the turning them into nonsense*) passed into a law; nothing, in my most humble apprehension, can well exceed the absurdity of those, who wished to be considered rational beings, much more so, the members of the legislature, in their reason, for adopting the legal innovation alluded to, viz. *that the generality of mankind, might be able to read the instruments, by which their lives, their liberties, and their properties were disposed of*; for I do not believe, there is a single individual to be found, in that country, which is so materially affected by the above innovation, as not to acknowledge, and few, very few indeed, who could not foresee, (and that too without *Scottish* prescience,) that neither the lawyer, nor the man of learning, would THEREAFTER be able to explain, such instruments, to the ignorant and uninformed; and I NOW defy the world, to decypher a record, prior to the reign of king *George* the Second, though written in *English*, because not in common characters, as enjoined by the innovating acts themselves; the records are not penned now even in legible

disgrace, or of their having been continued, without any variation, in correction of the style, equally serve in apology, for our presuming to strike them all out, which we have ventured to do, in the present edition; yet not indeed merely for the reason assigned, but likewise in that, there having been such an alteration in the law, by legislative injunctions, as well as judicial determinations, that inserting them would have swelled the book, to a very unprofitable, as well as unreasonable size; above fifty sessions of parliament have been held, since the original publication, and the following capital authorities, (among others) published, the source, whence the principal improvements of this TENTH edition, are drawn, viz.

legible characters, nay in the small space of two years (viz. 6 Geo. II.) the legislature itself, found it necessary, to retract their injunction of translating "*law terms*" and "*usual abbreviations*," whereby modern records at this hour, they consisting of ill writing, bad *French*, bad *Latin*, bad *English*, and abbreviations, are become more inexplicable, than the sphynx; inasmuch, as no art or knowledge, is equal to the task of developing them, which, from their use, their importance, and their value, were, in ancient times, deemed the jewels, and their depository, the treasury of the kingdom.

P R E F A C E.

The Reports
of

Sir James Burrow,
 Sir Michael Foster,
 Mr. Serjeant Sayer,
 Mr. Serjeant Wilson,
 Sir William Blackstone,
 Douglas,
 Cowper, and of
 Messrs. Durnford and East,

as also (though last mentioned, well deserves the first consideration of the emulous reader)

The Right Honourable Mr. Eden's
 “*Principles of Penal Law.*”

We may add, that since the period, we have been speaking of, several gentlemen, celebrated for their professional abilities, have distinguished themselves in those particular departments of the law, “conveyancing” and “special pleading” *Filmer* and *Booth* lately, and *Fearne* and *Hilliard* of the present day, are names of great celebrity in *Westminster Hall*.

Mr. *Hilliard*'s judgment, in publishing the treatise, that (1) bears the name “of *William Sheppard's Touchstone* of

(1) Tho' the *Touchstone* bears the name of *Sheppard*, yet the performance, seems to have been more justly attributed, to the pen of Mr. Justice *Doderidge*. See *Hill. Pref.*

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"*Common Assurances*," cannot be too much admired or recommended, in that, the late *William Rivett*, esq; the first lawyer, (without any disparagement to the time he lived in) in the conveyancing line, often declared, *Sheppard's Touchstone* to be the very best book, he ever read, on the subject.

In special pleading, we announce the names of *Warren* and *Wallace* of late time, and of *Tidd* and *Thomas Walton* of the day; the practising attorney and solicitor, having such assistances, as those above mentioned, at hand, would be unpardonable, to risque the ultimate success of his cause, or the validity of purchase deeds, on the flimsy, inaccurate, and obsolete precedents of any law wright whatever.

The reader will find in this edition, the title "*False Imprisonment*" first introduced, and title "*Ejectment*" much enlarged, particularly, as to the service of the declaration and subscription; that law upon vacant possessions, for non-payment of rent, under stat. 4 Geo. 2. and on mortgages, under stat. 7 Geo. 2.

The essential title of the law "*evidence*" "*warrants of attorney to confess judgment*"

P R E F A C E

ment" "new trials" "insolvent debtors" "fines and recoveries of land" those common assurances of the kingdom, and indeed, almost every other title, is considerably enlarged and improved, and that too, chiefly in extracts, from the above authorities; in veracity of the above assertions, we take leave to refer the sceptic reader to our "*Contents*" "*Statutes explained, &c.*" in front of this work, and to our "*Index*" at the end thereof.

A new and correct Chronological Table, of all felonies by statute, from the earliest period, to those of 27 Geo. 3. inclusive; distinguishing such as are intitled to, and such as are exempted from the benefit of clergy; that is to say, the crimes, for the commission and punishment of which, the offender does not, or does forfeit his life, is inserted, in p. 467. &c.

Trinity Vacation, 28 Geo. III.
A.D. 1787.

J. R.

THE

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* For felonies enacted during this reign, see our Chronological Table of them, in p. 468.

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415

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* For felonies enacted during this reign, see our Chronological Table of them, in p. 468.

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* For felonies enacted during this reign, see our Chronological Table of them, in p. 471.

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Charles the First.

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Charles the Second.

13 & 14 Car. 2. c. 3.	403
13 & 14 Car. 2. c. 12.	354
	424, 430
13 & 14 Car. 2. c. 21.	408
16 Car. 2. c. 7.	290
17 Car. 2. c. 7.	149
19 Car.	

STATUTES cited or explained.

19 Car. 2. c. 6.	Page 305	9 & 10 Wil. 3. c. 41.	Page 294
19 & 23 Car. 2. c. 10.	324	9 & 10 Wil. 3. c. 15.	17, 156
23 Car. 2. c. 9.	87	12 & 13 Wil. 3. c. 3.	400
23 Car. 2. c. 9.	87		
29 Car. 2. c. 3.	216, 262, 276,	* For felonies enacted during this reign, see our Chronological Table, in p. 475, 476.	
277, 278, 285, 317, 323, 324			
29 Car. 2. c. 7.	19		
31 Car. 2. c.	348		

* For felonies enacted during this reign, see our Chronological Table, in p. 474.

James the Second.

1 Jac. 2. c. 17.	216, 276, 285,
	317, 323, 324, 409

William and Mary.

1 W. & M. c. 8.	459
1 W. & M. c. 18.	425
1 W. & M. sect. 2. c. 2.	26, 397
2 W. & M. sect. 1. c. 5.	135,
	136
3 & 4 W. & M. c. 14.	6, 282
4 & 5 W. & M. c. 4.	25, 475
4 & 5 W. & M. c. 16.	270
4 & 5 W. & M. c. 21.	105, 164,
	475*
4 & 5 W. & M. c. 24.	182

* For felonies enacted during this reign, see our Chronological Table, in p. 474, 475.

William the Third.

6 & 7 Wil. 3. c. 14.	6, 282,
	474
7 Wil. 3. c. 3.	440, 443
7 & 8 Wil. 3. c. 32.	182
7 & 8 Wil. 3. c. 35.	327
8 & 9 Wil. 3. c. 26.	440, 476
9 & 10 Wil. 3. c. 25.	105, 476

Anne.

1 An. ft. 2. c. 17.	440, 477
3 An. c. 18.	182
3 & 4 An. c. 9.	275
4 & 5 An. c. 9.	19
4 & 5 An. c. 16.	7, 162, 175,
	248
6 An. c. 18.	305
6 An. c. 7.	440, 477
6 An. c. 31.	52
7 An. c. 21.	440
7 An. c. 25.	275, 475
8 An. c. 14.	8, 136, 357
10 An. c. 14.	52
12 An. c. 12.	291
12 An. fef. 1. c. 18.	354

* For felonies enacted during this reign, see our Chronological Table of them, in p. 476, &c.

George the First.

3 Geo. 1. ft. 2. c. 15.	407, 408,
	409
5 Geo. 1. c. 13.	226
6 Geo. 1. c. 21.	17
9 Geo. 1. c. 7.	421
9 Geo. 1. c. 29.	312
12 Geo. 1. c. 29.	20, 174

* For felonies enacted during this reign, see our Chronological Table of them, in p. 478, &c.

George

STATUTES cited or explained.

George the Second.

2 Geo. 2. c. 23.	P. 11, 14, n. 17, 176, 190, n. c. 28.	10
3 Geo. 2. c. 25.	183, 184, 185	
4 Geo. 2. c. 7.	183, 185	
c. 10.	361	
c. 28.	95, 105, n. 114, 115, 123, 136, 165, 267	
5 Geo. 2. c. 18.	415	
c. 19.	421	
c. 25.	163	
c. 27.	21	
c. 30.	289	
6 Geo. 2. c. 37.	185	
7 Geo. 2. c. 20.	116, 119, 270	
8 Geo. 2. c. 16.	460	
9 Geo. 2. c. 18.	482	
10 Geo. 2. c. 19.	290	
c. 28.	290	
11 Geo. 2. c. 19.	95, 103, n. 120, 137, 143, 150, 265, 266	
c. 24.	401	
12 Geo. 2. c. 13.	17	
c. 28.	290	
13 Geo. 2. c. 19.	290	
14 Geo. 2. c. 20.	256, 324	
15 & 16 Geo. 2. c. 28.	440	
17 Geo. 2. c. 5.	360	
c. 39.	440	
18 Geo. 2. c. 20.	415	
c. 34.	290	
20 Geo. 2. c. 30.	440	
21 Geo. 2. c. 3.	20, 21, 175	
22 Geo. 2. c. 2.	485, n.	
c. 16.	485, n.	
c. 19.	485, n.	
c. 24.	460	
24 Geo. 2. c. 18.	185, 186, 492, n.	
c. 44.	20, 430	
25 Geo. 2. c. 6.	283	
c. 29.	414	
c. 36.	290	
c. 37.	443	

26 Geo. 2. c. 21.	Page 30
c. 33.	329, 335, 336, n. 358
27 Geo. 2. c. 16.	484, 485
28 Geo. 2. c. 19.	290
29 Geo. 2. c. 19.	186
c. 22.	485, n.
c. 31.	361
30 Geo. 2. c. 19.	11, 14, n. 17, 176
c. 24.	290
c. 32.	485, n.
c. 35.	485, n.
c. 36.	485, n.
31 Geo. 2. c. 10.	294
c. 18.	485, n.
c. 22.	485, n.
c. 42.	480, 482, n.
32 Geo. 2. c. 13.	485, n.
c. 28.	19, 220, 221
c. 35.	105, n.
33 Geo. 2. c. 32.	485, n.

* For felonies enacted in this reign, see our Chronological Table of them, in p. 482, &c.

George the Third.

1 Geo. 3. c. 1.	399
2 Geo. 3. c. 1.	399
3 Geo. 3. c. 2.	171
19 Geo. 3. c. 70.	20
20 Geo. 3. c. 18.	See Errata. 229
20 Geo. 3. c. 64.	410
21 Geo. 3. c. 53.	335
22 Geo. 3. c. 9.	482
22 Geo. 3. c. 40.	491
22 Geo. 3. c. 53.	See Errata. 229
23 Geo. 3. c. 28.	See Errata. 229
25 Geo. 2. c. 80.	180
26 Geo. 3. c. 80.	483, n. 487, n.

* For felonies enacted during this reign, see our Chronological Table of them, in p. 492, &c.

b

ERRATA

ERRATA.

- Page 20. line 1. for "12 Geo. c. 59. read "12 Geo. 1. c. 39."
5, 6. for "19 Geo. c. 31. 70." read "19 Geo. 3. c. 70."
114. n. for "services" read "service"
190. n. *dele* "see contra."
194. line 31. *dele* "21 Jac. c. 12."
229. — 3. *add* "22 Geo. 3. c. 53. 22 Geo. 3. c. 28."
447. *Penultima* see Stat. 25 Geo. 2. c. 37. in Chronological
Table p. 443.
492. *dele* "24 Geo. 3. c. 27. f. 13."
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**EVERY MAN
His Own Lawyer:**

**OR,
A Summary of the Laws of Eng-
land, in a new and instructive
method.**

**Of Actions and Remedies,
Writs, Process, Arrests,
and Bail.**

All wrong may be considered as
merely a privation of right, the
one natural remedy for every spe-
cies of wrong is the being put in
possession of that right, whereof the party
injured is deprived. This may either be
effected by a specific delivery or restoration
of the subject-matter in dispute to the legal
owner; as when lands or personal chattels
are unjustly with-held or invaded: or, where
that is not a possible or at least an adequate re-
B remedy,

Of Actions and Remedies.

medy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c. to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury: tho' such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a *diversity* of SUITS and ACTIONS; which are defined by the mirror (c. 2. § 1.) to be "THE LAWFUL DEMAND OF ONE'S RIGHT:" or as *Bracton* and *Fleta* express it, in the words of *Justinian*, *jus prosequendi in judicio quod alicui debetur.*

The *diversity* of SUITS, or remedial instruments of justice, are from the subject of them distinguished into three kinds; Actions,

PERSONAL, REAL, and MIXED.

PERSONAL actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on CONTRACTS, the latter on TORTS or wrongs. Of the former nature are all actions upon debt or promises:—of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

REAL

Of Actions and Remedies.

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REAL actions, (or, as they are called in the mirror, c. 2. § 6. *feodal* actions) which concern real property *only*, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning *real* estates were decided; but they are now pretty generally laid aside in practice, on account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying title being since introduced, by other actions personal and mixed.

MIXED actions are suits partaking of the nature of the other two, wherein some *real property is demanded*, and also *personal DAMAGES for a wrong sustained*. As for instance, an action of waste: which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover, not only the land wasted, which would make it merely a *real* action; but also TREBLE DAMAGES, in pursuance of the statute of Gloucester, 6 Ed. 1. c. 5. which is a PERSONAL RECOMPENCE; and so both, being joined together, denominate it a *mixed* action.

Under these *three* heads may every species of remedy by suit or action in the courts of common law be comprised. But in order effectually to apply the remedy it is first necessary to ascertain the complaint.

Of Actions and Remedies.

All civil injuries are of two kinds; the one *without* FORCE or violence, as slander or breach of contract; the other coupled *with* force and violence, as batteries, or false imprisonment; (*Finch* L. 184.) which latter species savour something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king, as well as private satisfaction to the party injured. *Finch* L. 198. *Jenk. Cent.* 185.

This distinction of private wrongs, into injuries *with* and *without* force, runs thro' all the variety of which we shall now proceed to treat in the subsequent part of this book under

- | | | |
|---|--------------|---|
| <ol style="list-style-type: none"> 1. Of Debt. 2. On the Case. 3. Of Account. 4. Of Covenant 5. Of Detinue. 6. Of Trover. | }
Of
} | <ol style="list-style-type: none"> 7. Of Slander. 8. Of Assault and Battery. 9. Of Trespass. 10. Of Ejectment. 11. Of Assise. 12. Of Waste, &c. |
|---|--------------|---|

Action of *Debt* is a suit given by law where a man oweth another a certain sum of money, by obligation, or bargain for a thing sold, or by contract, &c. and the debtor will not pay the debt at the day agreed; then the creditor shall have this action against him for the same.

If money be due upon any specialty, action of debt only lieth; for no other action may be brought for it: and where a man contracts to pay money for things which he hath bought, and the seller takes bond for the money, the con-

Of Actions and Remedies.

tract is discharged; so that he shall not have action of debt upon the contract, but on the bond. *Nat. Br.* 268.

The usual action of debt, which consists of divers particular branches, lies in all these cases:

1. For money due on bond, or bill.
2. For rent due from tenants.
3. For goods or money delivered.
4. On an attorney's bill of costs.
5. For permitting a prisoner to escape.
6. Upon arbitrament, or a judgment.
7. On an act of parliament.

1. In a bond where several are bound severally, the obligee may have action of debt against all the obligors together, or all of them apart, and have several judgments and executions; though he shall have satisfaction but once: but when the bond is joint, and not several, all the obligors must be sued that are bound; and one is not obliged to answer without the rest. *5 Burr. Rep.* 2613. Also if a bond is made to three to pay money to one of them, they must all join in the action, for they are but as one obligee. *Dy.* 19, 310. *Yelv.* 177.

If there be several days mentioned for payment of money on a bond, the obligation is not forfeited, nor can be sued, until all the days are past: yet in some cases, the obligee may bring action of debt for the money due by the bond presently, though it be not forfeited; and by special wording the condition, an obligee may be able to sue the penalty on the first default. A man is bound to pay 20*l.* in manner following, that is to say, 10*l.* at one day, and

Of Actions and Remedies.

10*l.* at another; debt will not lie till after the last day, because it is an intire duty: but if one binds himself to pay 10*l.* on one day, and 10*l.* on another, after the first day action of debt lies for 10*l.* it being a several duty. *Co. Lit.* 292. 2 *Danv. Abr.* 501.

In action of debt brought upon a bond against an heir for the debt of his ancestor, it is not good for the heir to say, that the executors have assets in their hands; for the obligee may sue either heir or executor: if an heir hath assets, and the executor also, it is at the obligee's election to have action of debt against the one or the other; but he shall not charge them doubly. Debt lies against the heir of an obligor, who has lands by descent, if the executors have not sufficient: and if an heir has made over lands fallen to him by descent, execution shall be had against him to the value of the land, &c. if it be not sold *bonâ fide* before the action brought. *Dy.* 204. *Plowd.* 433. *Ander.* 7. *Stat.* 3 & 4 *W. & M. c.* 14. perpetuated by 6 & 7 *W.* 3. *c.* 14.

Action of debt lieth on a recognizance; so upon a statute merchant, being in the nature of a bond or obligation: but it is otherwise in case of a statute staple. A man owes another a sum of money, and hath his note under hand, without seal, an action of debt on a *mutuatus* lies; but the defendant may wage his law: in action of the case brought upon promise of payment the defendant cannot wage law. 4 *Rep.* 93. 2 *Danv. Abr.* 497.

If debt is brought on a single bill, the defendant may plead payment, before the action brought, in bar: and pending an action on bond, &c. the defendant may bring in principal,

Of Actions and Remedies.

pal, interest and costs; and the court shall give judgment to discharge the defendant, by stat. 4 Ann. c. 16. s. 13.

Upon application to stay an action of debt upon bond, upon payment of principal, interest and costs: cause shewn and opposed, unless costs of suit in the *Exchequer* relating to the same matter be paid. Lord Ch. Just. *Hardwicke* said, he believed it had been ruled upon the above clause that it should be done; and that costs in equity relating to suits on bonds have been referred to, and taxed by the master. Rule absolute to stay the proceedings on payment of principal, interest and costs, and of the costs in the *Exchequer*. M.S.S. Cas. *East*. 8 Geo. 2. *Lock and Sbermer*. See *Gilb. Case*. 291.

An executor brought error on a judgment against the testator upon bond: and after affirmance moved on stat. 4 Ann. c. 16. sect. 13. to pay principal, interest and costs, it was insisted, that as he came for a favour to save the penalty, it was but equitable he should pay the costs in error which he had put the plaintiff to; for if plaintiff had taken execution, equity would never punish him for taking those expences out of the penalty.

On the other side were cited *Baynham v. Matthews*, 2 Str. 871. where an executor discontinued without costs. 2 Kel. 70. pl. 28. S. P. 2 *Barnard. K. B.* 134. S. C. S. P. and *Sidney v. Newinson*. Upon the authority of which case, the court determined, that as by law the executor was not to pay costs upon a writ of error, a court of law could not direct them to be taxed, though there was a penalty. 2 Str. 1072.

The case of *Sidney v. Newinson* was, That plaintiff had brought an action of debt upon

Of Actions and Remedies.

bond against defendant as administrator, and filed a bill in equity to discover assets; and had instituted a suit in the spiritual court, to oblige her to give in an inventory. After judgment for the plaintiff in the action, a writ of error was brought in *K. B.* and the judgment reversed. Then plaintiff brought a new action in *K. B.* and defendant moved to stay proceedings upon stat. 4 *Ann. c. 16. sect. 13.* on paying principal, interest, and costs; and now upon motion for the court's direction to the master in taxing the costs, it was insisted for plaintiff, that defendant ought to pay the whole costs of the first suit, proceedings in *Chancery*, and spiritual court.

The court said, that they had nothing to do to order costs for proceedings in another court, which has power to award costs if the party is intitled to them; and as to the judgment, that is reversed, there is no reason for defendant to pay for plaintiff's error and mistake. The court was of opinion, the proceedings in this court must be stayed on payment of the costs of this suit. *Str. 699.*

2. An action of debt lies for rent in arrear, upon a lease for life or years; at common law it lay not on leases for life, but now by statute it may be had. 8 *Ann. c. 14.* If tenant in fee-simple, or fee-tail die, his executor may have action of debt by the stat. 32 *H. 8. c. 37.* for arrears of rent incurred in the life-time of such tenants, or he may distrain for the same; but before this act the executor had no remedy. *Cro. Car. 471.*

The remedy by the common law for rent on a lease for life was assise, if the plaintiff had seisin, or by distress; and if tenant for life died, his

Of Actions and Remedies.

his executors might bring action of debt for the rent in arrear: but a new remedy is given by the above statute, and that is to distrain. *3 Rep. 65. 3 Salk. 304.*

If a rent or lease for years of land is reserved and made payable at four quarter-days, the lessor may have action of debt after the first day of failure; for every quarter's rent is a several debt, and distinct actions may be brought for each quarter. *5 Rep. 81. 2 Vent. 129.* An assignee of rent upon a lease for years, shall have debt for it: and action of debt will lie against a lessee, for rent due after the assignment of the lease; for the personal privity of contract continues though the privity of estate is gone: but it is otherwise, if a landlord once accepts the rent of the assignee, knowing of the assignment. *Lev. 22. 3 Rep. 22, 23.*

When the lease is ended, the duty in respect of the rent remains, and debt lieth by reason of privity of contract between lessor and lessee. *Cro. Jac. 227.*

Rent cannot be sued for, in court of conscience in *London*; nor in court of requests of *Tower Hamlets*. *Dougl. Rep. 245.*

If landlord give notice to his tenant to quit at the expiration of the lease, and tenant hold over, landlord is intitled to double rent. *Durnf. and East, Rep. 153, 54.*

3. Action of debt lieth upon a parol contract by word only, and so doth action on the case: and in some cases, debt will lie, although there be no contract betwixt the party that brings the action, and him against whom brought; for there may be a duty created by law. But action of debt lieth not against executors, upon a simple contract made by the testator: though it lies for the arrearages of an account against executors,

Of Actions and Remedies.

executors, of receipts by the testator. 2 *Saund.* 343. 9 *Rep.* 87. *Lil. Abr.* 403. 2 *Danv. Abr.* 497.

If goods or money are delivered to a third person for my use, I may have action of debt, or account for them. And where money is delivered to a person to be re-delivered again, the property is altered, and debt lies: but where a horse, or any goods are thus delivered, there action of detinue lieth. Action of debt lies against the husband, for goods which were delivered or sold to the wife, if they come to the husband's use: and if one delivers meat, drink or clothes to an infant and he promises to pay for them, action of debt or on the case will lie against the infant; but what is delivered, must be averred to be for the necessary use of the infant. 2 *Danv. Abr.* 404. *Nels. Abr.* 603. 1 *Lil. Abr.* 400, 401.

A man agrees with a taylor to make him a suit of clothes, for a certain price; the taylor may bring a general action of debt against him for the money, but if the price is not agreed on, action of the case only lies, or special action of debt on the special contract. *Wood's Inst.* 9th edit. 563.

4. An attorney shall have action of debt against his client, for money which he has paid to any person for such client, for costs of suit, or to his counsel, &c. And an action of debt, or case, lies for an attorney for his fees against him that retained him in his cause: but attorneys are not to demand more than their just fees; nor to be allowed any extraordinary fees to counsel, without tickets signed by them, &c. And it is said to be a good plea to an action brought by an attorney for his fees, that the plaintiff did

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did not give the defendant any bill of charges, according to the statute. *Lil. Abr.* 142. *Stat.* 3 *Jac.* c. 7. *T. Raym.* 245. 2 *Geo.* 2. c. 23. perpetuated by 30 *Geo.* 2. c. 19. s. 75. See *Moseley's Rep.* 68. *Str.* 633. *Pract. Reg. C. P.* 36. *Rep. & Cas. Pract. C. P.* 27. *Bac. Abr.* 130.

If a client, when his business in court is dispatched, refuseth to pay the officer his court fees; the court on motion will grant an attachment against him, on which he shall be committed until the fees are paid. *Lil. Abr.* 598. See *Attornies and Solicitors*, post.

But officers guilty of extortion shall render treble value: and an action may be brought against attornies for extortion, and the party grieved shall have treble damages and costs. 3 *Ed.* c. 26, 27, 30.

5. Action of debt lies against a gaoler permitting a prisoner committed in execution to escape, for thereupon the law makes the gaoler debtor; and where the party is not in execution, there action on the case lieth for damages suffered by the escape. *Saund.* 218.

If a prisoner escapes who was in execution, his creditor may retake him by *capias ad satisfaciendum*; or bring action of debt on the judgment, or a *scire facias* against him, &c. for he hath still an interest in the body, as a pledge for the debt. If the prisoner makes a tortious escape, the person at whose suit he was taken in execution, may have an *alias cap.* to take him again; or action of the case against the sheriff: but if the sheriff voluntarily permit the escape, debt may be brought against the sheriff. *Ventr.* 269. *Lil. Abr.* 536. 3 *Salk.* 160.

In

Of Actions and Remedies.

In debt for escape against sheriff, indorsement of *non est invent.* upon *ca. sa.* insufficient evidence of it's having been delivered to him. *Cowp. Rep.* 63.

Debt lies against sheriff for escape, if defendant taken in execution is seen at large for any short time, even before return of the writ. *Bl. Rep.* 11. 1048.

Action lies against goaler for escape, upon mesne process, tho' prisoner return to prison same day he is proceeded against. *Wilf. Rep.* 11. 294.

In escape upon mesne process, out of borough court, brought into *B. R.* against bailiff thereof, defendant in *B. R.* shall not take advantage of process below. *Wilf. Rep.* 1. 255.

Debt lieth against a sheriff, for money levied in execution: and if a defendant in execution is rescued, the sheriff is liable for the whole debt, and is to have his remedy against the rescuer. *Dy.* 241.

6. A person may have action of debt upon an arbitrament; but not for debt referred to arbitration, which must be action on the case: and debt will lie for breach of a by-law, or for amercement in a court-leet, &c. Action of debt shall be brought for money adjudged to be paid by arbitrators, declaring on the award; and also upon the bond for not performing it. *New. Nat. Br.* 267. *Brownl.* 55. *Lil. Abr.* 400.

Debt lies for money recovered upon a judgment, &c. And if a man recovers debt or damages in *London*, on action brought there by the custom of the city, which lies not at common law; when it is become a debt by the judgment,

judgment, action of debt lies upon, this judgment in the courts at *Westminster*. *Nat. Br.* 268. 2 *Danv. Abr.* 499. In actions of debt on bonds, a rule may be made to stay proceedings on payment of principal, interest and costs; but not in actions of debt upon judgments; yet the defendant may plead a tender and *uncareprist*. 6 *Mod.* 60.

Action of debt upon judgment will not lie, after defendant has been taken in execution, on *ca. sa.* and discharged by plaintiff's consent. 4 *Bur. R. p.* 2483.

Action of debt on judgment not favoured. 1 *Black. Rep.* 507. *Say. Rep.* 44. 161. *Will. Rep.* 1. 120. generally oppressive. *Bur. Rep.* 111. 1549.

B. has judgment of *non pros.* against *A.* and brings debt on that judgment, and signs judgment by default, then brings a second action of debt, on such second judgment, and therein also signs judgment by default; execution stayed on third judgment, on *A.*'s bringing into court, debt and costs recovered on second judgment. *Bl. Rep.* 11. 785.

If original debt be under ten pounds, the addition of costs will not entitle plaintiff in action of debt on judgment to hold defendant to bail. *Bur. Rep.* 111. 1389.

Special bail not required in debt upon judgment, though above 10*l.* damages. *Will. Rep.* 1. 120.

Simple contract debt is not extinguished by being allowed in a settled account. *Say. Rep.* 270.

Action of debt will not lie on an old judgment, after *ca. sa.* and discharge by plaintiff's consent. *Bur. Rep.* 14. 2483.

Debt

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Debt will lie on a foreign judgment. *Dougl. Rep. 1. &c.*

Debt will lie wheresoever, *indub. ass. will. Dougl. Rep. 6.*

7. Action of debt is sometimes grounded on an act of parliament; as for a parson against a parishioner for not setting out tithes, wherein the plaintiff shall recover the treble value, by the statute 2 *Ed. 6. c. 13.* Against a hundred for a robbery committed on the highway in the day-time of any day, except *sunday*, when the hundred shall answer it, if the robbers are not taken in 40 days, *&c. 27 Eliz. c. 13.* See *Com. Rep. 345. Stra. 406.* Against a man for arresting, or causing one to be arrested in another man's name, without his consent, upon the statute 8 *Eliz. c. 2.* And if an * attorney suffer another to follow any suit in his name, he shall forfeit † 20*l.* and the party grieved shall have debt; by 3 *Jac. c. 7.* And so in many other cases debt lieth.

Where an action is brought in consequence of a right liquidated by means of a statute, the statute is the only ground of the action. *Cowp. Rep. 476.*

* An attorney who gives another leave to practice in his name, is answerable for what he does in his name. *12 Mod. 666.*

† By stat. 2 *Geo. 2. c. 23. sect. 17.* [perpetuated by 30 *Geo. 2. c. 19. sect. 75*] he shall forfeit 50*l.* and be incapable of acting.

Of Actions and Remedies.

The manner of Proceeding in actions of Debt.

THE Proceedings upon actions of debt in order to trial in the courts at *Westminster*, are,

1. By writs, process, and arrests.

2. By bail and appearance.

3. By declarations, pleadings, &c.

1. A writ is the king's precept, commanding something to be done touching a suit or action. And of writs there are divers kinds, in many respects; some are real, concerning the possession of lands, called writs of entry, or of right touching the property, &c. Some are personal, relating to goods, chattels, and personal injuries; and some are mixed, for the recovery of the thing and damages. *2 Inst. 39.*

The writs in civil actions are either original, or judicial; original writs are issued out of the court of chancery, for the summoning a defendant to appear; and judicial writs issue out of the court where the original is returned, after the suit is begun, to carry on the cause: the original bears teste in the name of the king; but judicial writs bear date in the name of the chief justice; and a writ without a teste is not good, for the time may be material when it was taken out; and if it be out of the common law courts, it must bear date some day in term (not being *sunday*;) but in chancery writs may be issued in the vacation as well as term-time, as that court is always open: also there are to be fifteen days between the teste and return of writs,

2 where

Of Writs and Remedies.

where the suit is by original; but by statute, delays in actions by reason of fifteen days between the teste and return in personal actions and ejectments are remedied. *F. N. B.* 51, 147. *2 Inst.* 40. *13 Car.* 2. c. 24.

An original writ defective in form, is abatable; but it is allowed to be good by pleadings, &c. and though an original may not be amended, yet a new writ may be taken out, where it is not amendable: writs judicial, if erroneous, may be amended; and writs may be renewed every term, until a defendant is arrested, but not after four terms in *B. R.* when a new writ must be issued, and the plaintiff may not renew the old one. And all writs are to be returned and filed in due time, in the court where returnable; for the filing thereof is the warranty for the proceeding. *2 Lill. Abr.* 716; 717.

The king's writs cannot be denied to the subjects; and after the action is fixed on, for a wrong done, or a right detained, as in debt, on the case, &c. such a writ must be taken out as is suitable to the action, being grounded upon it; and if in the writ several persons are included, (for several defendants may be put in one writ) there must be several warrants from the sheriff to execute the same. *Wood's Inst.* 381.

Attachment lies against sheriffs, &c. for not executing writs; or for doing it oppressively by force, or not doing it effectually, through any corrupt practice. The sheriff's bailiffs cannot execute a writ directed to the sheriff, without his warrant: and sheriffs are not to grant warrants for arrests, before the receipt of the writ; if they do, they shall forfeit 10*l.* and damages. *40 Eliz.* c. 6.

No

No high sheriff, under-sheriff, their deputies or agents, shall make out any warrant before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of 10*l.* *Stat. 6 Geo. c. 21. f. 53.*

Every warrant to be made out upon any writ of *K. B. C. P.* or *Excequer*, before judgment, to arrest any person, shall have the same day and year set down thereon as shall be set down on the writ itself, under forfeiture of 10*l.* to be paid by the person who shall fill up or deliver out such warrant. *Id. f. 54.* See *Stat. 9 W. 3. c. 15.* how penalties to be recovered and divided.

Every warrant upon process for arresting shall, before execution, be subscribed or endorsed with the name of the attorney, clerk in court, or solicitor, by whom such process shall be sued forth; and where such attorney shall not be the person immediately employed, then also with the name of the attorney so immediately employed. *Stat. 2 Geo. 2. c. 23. f. 22.* perpetuated by 30 *Geo. 2. c. 19. f. 75.*

Not subscribing or indorsing the name of the attorney, &c. on any warrant made upon any writ or process, shall not vitiate the same, but such writ, and all proceedings thereon, shall be valid and effectual, provided the writ whereon such warrant be made out be regularly subscribed or endorsed; and every sheriff, or other officer, who shall make out any warrant upon any writ, &c. and shall not subscribe or indorse the name of the attorney, &c. who sued out the same, shall forfeit 5*l.* to be assessed by the court out of which such writ, &c. shall issue; one moiety to be paid to his majesty, and the other moiety to the person grieved. *Stat. 12 Geo. 2. c. 13. f. 4.* See 2 *Barnard. K. B. 198, 407, Ld. Raym.*

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586. *Sir W. Jones* 346. *pl. 5. Cro. Car.* 372. *pl. 6. Hawk. Pl. C. chap. 31. sect. 37. p. 86. Str.* 156. *H. H. P. C.* 457. *Barnes's Notes C. P.* 303. *Pract. Reg. C. P.* 441, 442. 2 *Barnes* 327.

If a bailiff be kept off from making an arrest, he shall have an action of assault: and where any bailiff touches a man, which is an arrest, and he makes his escape, it is a rescous, and attachment may be had against him. If a bailiff lays hold of one by the hand, whom he had a warrant to arrest, as he holds it out at the window; this is such a taking of him, that the bailiff may justify the breaking open the house to carry him away: but doors may not be broke open to make an arrest in civil cases, unless it be in pursuit of one arrested. *Ventr.* 306. 5 *Rep.* 91. *Salk.* 79. *Fost. Cr. Law* 319, 320.

And arrest in the night, as well as the day is lawful. 9 *Rep.* 66. *Cro. Jac.* 280. *pl. 10.* 486. 3 *Salk.* 46. *Jenk. Cent.* 291. *pl. 30.* *H. P. C.* 45. 5 *Co.* 92. *b. Ow.* 63. But no writ, process, &c. (except in criminal cases) shall be served on a Sunday; on pain that the party serving them shall be liable to the suit of the party grieved, and answer damages as if the same had been done without writ; and action of false imprisonment lies for arrest on a Sunday, and the arrest is void. *Stat.* 29 *Car. 2. c. 7.* 12 *Mod.* 348. *T. Raym.* 250. *Wats. Clerg. law,* chap. 34. *p. 344, 345.* *Gibbs. Cod. tit. 10. p. 238.* 12 *Mod.* 607. 6 *Mod.* 96. *Haw. P. C.* 86. chap. 31. *sect. 58. H. H. P. C.* 457. *note (f).* *Cro. Jac.* 602. *pl. 6. Salk.* 78. *pl. 1. 5 Mod.* 95. *Barnes's Notes C. P.* 228. *Stat. 5 An. c. 9. s. 3. 1 An. st. 2. c. 6. 2 Salk.* 626. *pl. 7. 3 Salk.* 149. *pl. 1. 2 Ld. Raym.* 1028. A person may be retaken on a Sunday, where arrested the

the day before, or upon an escape warrant, when one goes at large out of the rules of the King's Bench or Fleet prison, &c. 6 Mod. 231. 5 An. c. 9. Fortesc. Rep. 374.

If where there are several persons of the same name, a bailiff arrests a wrong person, he is liable to action of false imprisonment: and if he arrests a man without warrant, though he afterwards receives one from the sheriff; or if he arrests one after the return of the writ be past; and where a bailiff demands more than his just fees when offered, and detains a person thereupon; or if a man be any ways unlawfully detained; in all these cases it will be false imprisonment; and large damages are recoverable in these actions. Dy. 244. Co. Lit. 124. Dalt. chap. 2. p. 111.

No bailiff shall carry any person arrested to a tavern, alehouse, &c. without his consent, so as to charge him with any beer, ale, wine, &c. but what he shall freely call for; nor shall carry him to prison within 24 hours; nor demand any greater sum than the law allows, for the arrest or waiting till bail is given, &c. or receive a greater sum for lodging or a day's diet than is allowed by justices of peace, &c. 32 Geo. 2. c. 28.

If a debt be under 10*l.* on writs out of a superior court, or under 40*s.* in an inferior court, the defendant shall not be arrested, but be personally served with a copy of the process, and not appearing at the return, the plaintiff may enter an appearance for him, and proceed, &c. No person shall be held to special bail on such writs; and affidavit to be made of the cause of action, when it is 10*l.* &c. or upwards, and the sum indorsed on the writ, for which only bail shall be taken, where a man is arrested.

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Stat. 12 Geo. 6. 59. perpetuated by 21 Geo. 2. c. 3.

The above statutes of 12 Geo. 1. c. 29. and 5 Geo. 2. c. 27. as far as they relate to arrests in inferior courts, are repealed by *Stat. 19 Geo. 3. 70.* for thereby no person can be arrested in any court under 10 l.

Affidavit to hold to bail, in explanation of a positive affidavit, that above the sum of 10 l. is justly due to the plaintiff, not permitted to be read. *Say. Rep. 54. Wilf. Rep. 1. 335. S. P. Dougl. Rep. 467.*

Affidavit, that defendant is indebted to plaintiff in 100 l. upon penalty of bond; or upon breach of articles, is not sufficient to hold to special bail. *Say. Rep. 109.*

Several defendants in different actions cannot be held to bail on one affidavit of debt. *Dougl. Rep. 217, 218.*

Same defendant cannot be held to bail on different causes of action, on one and the same affidavit. *Dougl. Rep. 218. n.*

Affidavit that defendant is indebted to plaintiff, in so much money upon promise, not sufficient to be held to bail. *Dougl. Rep. 467, 468.*

A. maketh that B. is indebted to, &c. good affidavit of debt, though the word *oath* omitted, which note. *Lofft's. Rep. 85.*

Affidavit to hold to bail must be positive. 2 *Burr. Rep. 655, 1032, 1111, 1447, 1687, 4 2126, 2127.* See 2 *Bl. Rep. 740, 850. 1 Wilf. Rep. 231, 279, 339. Say. Rep. 59.*

Affidavit that defendant is indebted to plaintiff in 103 l. for goods which defendant converted to his own use, sufficient to hold custom-house officer to bail, in trover. 1 *Wilf. Rep. 135.*

Swearing to *belief* is sufficient, in the case of an executor (4 *Bur. Rep.* 2282. *Durnf. & East's Rep.* 83.) or administrator, or assignee of bankrupt. 4 *Bur. Rep.* 1992, 2283.

Affidavit to hold to bail having one stamp only, and debt and *assumpsit* joined, irregular. 5 *Bur. Rep.* 2690, 2691.

When the cause of action is under 10*l.* in any superior court, or 40*s.* in inferior, the process shall be in *English*, and the defendant served with a copy of it, and also notice thereon to appear at the return, &c. And the fee of making and serving the copy of the process and notice, shall be no more than 5*s.* out of superior courts, and 1*s.* the inferior courts. 5 *Geo. 2. c. 27.* perpetuated by 21 *Geo. 2. c. 3.*

If writ be sued out in term, it must bear date first day thereof; if in vacation, last day of preceding term. 2 *Burr. Rep.* 964.

Service of *latitat* at eight o'clock in the evening of that day, whereon it is returnable though the declaration be left in the office, in the course of the same day, is good. *Durnf. and East's Rep.* 191. 2 *Bur. Rep.* 812, 813. S. P. 2 *Wils. Rep.* 263. S. P.

Latitat, except where replied to statute of limitations, or to avoid a tender, or where it is given in evidence to support a parol action in point of time, is considered but as process. *Cowp. Rep.* 454.

Therefore time of suing it forth, except in the above mentioned cases, is immaterial. *Cowp. Rep.* 454.

It may bear teste before cause of action, *Cowp. Rep.* 455. if really prosecuted after. 2 *Bur. Rep.* 967. So it may be sued out before. *Dougl. Rep.* 62.

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Fiction of writ being taken out in vacation, and tested last day of term, cannot be contradicted, so as to invalidate writ. *Cowp. Rep.* 178.

If party be arrested by bill of *Middlesex* out of the county, the proceedings will be set aside for irregularity. *Dougl. Rep.* 384. *Durnf. and East's Rep.* 187. *S. P.*

Plaint not *capias* commencement of suit in *Marshalsea* court. *Dougl. Rep.* 61.

Capias considered as commencement of suit, in the court of common pleas. *Dougl. Rep.* 62. *n.*

Though declaration in *C. B.* state original to be sued out, *capias* insufficient evidence thereof. *Dougl. Rep.* 62. *n.*

Writ of *latitat* runs into *Wales*. *Dougl. Rep.* 213. *n.*

Personal service necessary in the first process on *latitat*. *Lofft's Rep.* 253.

Name of plaintiff's attorney, not inserted in notice of writ of *latitat* vitiates notice. *Lofft's Rep.* 58.

Latitat good commencement of penal action. 2 *Burr. Rep.* 964.

Original writ abateable, if dated before cause of action. 2 *Burr. Rep.* 967.

Latitat to save bar of statute of limitations of action, must be taken out with intent to declare in that action, and must be continued to the filing of the bill. 2 *Burr. Rep.* 991.

What species of writs do not run to the different dominions of the king, or of the crown. 2 *Burr. Rep.* 855, 856.

Time of suing out *latitat*, may be averred against the teste of the writ. 1 *Bl. Rep.* 217.

Teste of writ, by relation, first day of term. 1 *Bl. Rep.* 217.

Latitat

Latitat may be alledged to be sued out of term time, though usually alledged to be sued out last day of preceding term. 2 *Bl. Rep.* 683.

If judgment be in *Wilts, ca. sa.* cannot go into *London*, without a *testatum* previously sued out, or awarded on the roll. 2 *Bl. Rep.* 694.

A whole term intervening between *teste* and return of *capias*, same absolutely void. 2 *Bl. Rep.* 846.

Latitat may be considered in nature of original writ. 1 *Wils. Rep.* 147.

When attachment of privilege replied, in order to save stat. of Limitations, *teste* only need be shewn, without continuances. 1 *Wils. Rep.* 167.

No notice to appear necessary on copy of process served, where debt under 10 l. 1 *Wils. Rep.* 22.

Service of process regular, where doubtful whether place wherein it was served, was in *London* or *Middlesex*. 1 *Wils. Rep.* 77.

Process served without defendant's name to notice at bottom thereof, bad. 1 *Wils. Rep.* 104.

Irregularity of process cannot be taken advantage of, till returned. *Wils. Rep.* 111, 58.

Process against an attorney is always returnable on a day certain. *Wils. Rep.* 111, 58.

Declaration in *qui tam*, &c. upon *cap. ad respond.* in own name only, well enough. *Wils. Rep.* 111, 141.

Fifteen days to be between *teste* and return of a *cap. ad respond.* *Wils. Rep.* 111, 454.

Latitat void, if tested out of term. 4 *Burr. Rep.* 2588.

Bailiff in execution of mesne process, may break open the door of a lodger's apartment, having first gained peaceable entrance at the

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outer door of the house. *Cowp. Rep.* 1. *Lofft's Rep.* 274.

Arrest must be by authority of bailiff, but he need not personally arrest, nor be in sight, nor within any precise distance, but must be actually employed upon that business. *Cowp. Rep.* 65. *Lofft's Rep.* 527.

Members of parliament privileged from arrests, in all cases, except treason, felony, and breach of the peace. *Wilf. Rep.* 11. 159.

Written agreement to put in bail for person arrested on mesne process, at return of writ, or surrender body, or pay debt and costs, made by third person, with sheriff's bailiff, in consideration of discharging party arrested, is void. *Durnf. and East's Rep.* 418.

2. Bail is security for the appearance of the defendant, at a day and place certain, to answer the plaintiff's suit. And in all cases where process issues forth of *K. B.* to take the defendant's body, if an appearance only, and not special bail is required, there the defendant may appear in court in his proper person, and file common bail. *Lil. Abr.* 85.

Wife may appear without her husband. *1 Wilf. Rep.* 264.

Party may appear before return of writ. *1 Wilf. Rep.* 39.

The difference of appearing in person and attorney. *1 Wilf. Rep.* 42.

There is both common and special bail: Common bail is in actions of small concernment; being called common, because any sureties, as *John Doe* and *Richard Roe*, in that case are taken; whereas in cases of greater weight, as actions upon bond or specialty, &c. where the debt amounts to 10*l.* or above, (of which an affidavit of the debt is now to be made) special bail

bail or surety must be taken, such as subsidy-men at least, and they according to the value.

4 *Inst.* 179.

As there are different kinds of bail; so there are divers sorts of bail-pieces, viz. 1. A common bail-piece, where the defendant is served with a copy of the process; this is merely to bring the defendant into court, and is in nature of an appearance in the court of Common Pleas. 2. A special bail-piece on a *cepi corpus*, or arrest returned, when the defendant is actually arrested, and the sheriff has taken a bail-bond. 3. A bail-piece or an *habeas corpus*, in case a defendant lives at a great distance from *Westminster*, and a cause is removed out of an inferior court. 4. Bail-pieces taken before commissioners in the country, by virtue of the stat. 4 *W. & M. c. 4.*

These bail-pieces, if common, are to be filed in the office within six days after the end of the term the attorney appears: and special bail, which is taken before a judge, or by commissioners, when accepted, is to be filed; after 20 days notice given of putting in special bail before a judge on a *cepi corpus*, if there is no exception, the bail shall be filed in four days. Upon a *habeas corpus*, 28 days are allowed to except against the bail, and after that, if it be not excepted against, it shall be filed in four days.

Lil. Abr. 174. *Salk.* 98.

Bail is not properly such till it is filed; but it shall be accounted good, till the same is questioned and disallowed. And when cognisors of bail are questioned, they must justify themselves in open court by oath of their abilities; or before one of the judges of the court; or by affidavit before the commissioners as took the bail: and the court may adjudge bail sufficient; when the plaintiff will not accept it. Also a defendant,

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ant, with leave of the court, may deposit money in court instead of bail: and the court on motion, or a judge at his chamber, will order a common appearance to be taken when special bail is not required. *Lil. Abr.*

If the defendant does not find common or special bail, the attorney for the plaintiff is to call upon the sheriff for the return of the writ; on default whereof, a rule being made for it, the sheriff shall be amerced, or summoned before a judge to shew cause, &c. and if on a *cepi corpus* no bail is returned, a rule will be made out to bring in the defendant's body. When a sheriff hath taken good bail of the defendant, he will on a rule return a *cepi*, and assign the bail-bond to the plaintiff; which may be done by indorsement, without stamp, so as it be stamped before action brought thereupon; and then if the bail-bond, &c. be forfeited, the plaintiff may bring his action on the bond in his own name. *Stat. 4 & 5 Ann.* But upon such assignment of a bail-bond and action brought thereon, neither defendant nor bail can be arrested on the bond, but served only with a copy of the process; for otherwise bail might be taken *ad infinitum*.

Statute 1 *W. & M. sess. 2. c. 2.* provides against excessive bail.

On exception entered against bail the defendant must procure them to justify in four days, if in term, or on the first day of the next term, in vacation. *Ord. K. B. East. 5 Geo. 2.* Altho' the bail taken by the sheriff on bail-bonds is put in above, yet the plaintiff may except against such bail: special bail shall be perfected by the defendant within four days after

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ter exception, or in default the plaintiff may proceed on the bail-bond; and the like is to be observed on bail put in upon writs of error, or they may be *non-prossed*. No attorney shall be bail; nor shall any bailiff be permitted to become bail in any action or suit. *Ord. C. P. Mich. 5 Geo. 2.*

If a plaintiff does not declare against the defendant in two terms after bail is put in, the defendant may *non-pross* the plaintiff, and then the bail are discharged; for in such case the defendant is to go only upon common bail, by the rules of the court. If the defendant render himself to custody in discharge of his bail, upon the day of the return of the said writ of *scire facias* against the bail, the court sitting, the bail shall be discharged: And the bail may bring in the body of the defendant, at any time before the return of the *alias scire facias*, and render him up, which will discharge the bail; but care must be taken that the bail-piece be vacated in the office. *Rol. Abr. 250. 6 Mod. 238. Salk. 98.*

Special bail not necessary in action of debt on judgment, if special bail in original action. *Say. Rep. 43, 161.*

Fugitive may be holden to special bail. *Say. Rep. 308.*

If one person be excepted to bail, and another be added, name of former may, with leave of the court, be struck out of bail-piece, at any time before action of *sci. fa.* brought. *Say. Rep. 58, 309.* and after brought, proceedings against him may be stayed. *Say. Rep. 309.*

If principal be rendered by bail *exoneretur* may be entered on bail-piece. *Say. Rep. 8.*

Recog-

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Recognizance entered into by bail is, in strictness of law, forfeited, upon return of *non est invent.* to *ca. sa.* *Say. Rep.* 121.

Where plaintiff might have had judgment against original defendants, bail below are liable for the whole debt and costs. *Cowp. Rep.* 71.

Defendant superseded for want of being charged in execution, within two terms after judgment, cannot be held to special bail, in action on judgment. *Cowp. Rep.* 72.

Defendant who has had judgment against him in action for less than 10*l.* cannot be held to special bail, upon the judgment, in *B. R.* *Cowp. Rep.* 128. but may in *C. B.* 4 *Burr. Rep.* 2126, 2127.

Bail will be discharged upon motion, if defendant becomes a peer of the realm, pending the action. *Dougl. Rep.* 45.

If notice of justification has been given by new attorney, not allowed by court, bail will not be permitted to justify. *Dougl. Rep.* 217. 2 *Bl. Rep.* 1323. *S. P.*

Bail not liable beyond debt sworn to, and costs, whatever damages may be given. *Dougl. Rep.* 449, *n.* 450. *Lofft's Rep.* 545.

Keepers of prison cannot be bail. *Dougl. Rep.* 466.

Notice that *A. B.* and *C.* or two of them will justify, bad. *Lofft's Rep.* 26. *Bl. Rep.* 1122. *S. P.*

Bail cannot justify upon effects out of the reach of the process of the court. *Lofft's Rep.* 34, 147. 4 *Burr. Rep.* 2526, 2527. but see 1 *Bl. Rep.* 444. and 2 1323. both which seem *contra.*

Parish

Parish only of residence of bail in notice, too vague. *Lofft's Rep.* 72, 194.

Irregular notice entitles to further day to justify, but does not make bail bad. *Lofft's Rep.* 72, 194.

Bail not present at sitting of court, must wait until it rises. *Lofft's Rep.* 88.

No sheriff's officer or person concerned in execution of process shall be bail. *Lofft's Rep.* 153. 2 *Bl. Rep.* 799.

Time given to justify, on names of bail being omitted in notice. *Lofft's Rep.* 187.

Bail, not knowing in how many actions, or for what sums he was bail, rejected by court. *Lofft's Rep.* 194.

Notice given in name of one plaintiff, when several in cause, bad. *Lofft's Rep.* 237.

Notice of more bail than two good, if they can all justify. *Lofft's Rep.* 252. 2 *Bl. Rep.* 1122. *contra.*

No ground to reject bail, in that he has not been assessed to poor's rate. *Lofft's Rep.* 328.

Notice of bail's residence in *Hatton-street*, *Middlesex*, sufficient. *Lofft's Rep.* 418.

Four days to put in bail, mean exclusive of the return day; if *Sunday* last day, all *Monday* allowed for that purpose. *Lofft's Rep.* 190.

If time for excepting against bail, be expired without having justified, they are no bail. *Lofft's Rep.* 224. 3 *Wils. Rep.* 59. and no justification afterwards will be allowed. *Lofft's Rep.* 224.

How bail may surrender a soldier in their own discharge. 1 *Burr. Rep.* 339, 340.

Defendant held to bail, second time, for same cause of action, after discontinuance, by reason of a mistake. 2 *Wils. Rep.* 381.

Sci.

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Sci. Fa. holden irregular, because plaintiff was apprised of surrender; and because they were not sued in *Middlesex*, where the bail piece remained, after the surrender. 1 *Burr. Rep.* 340.

It is the duty of sheriff's officers to take bail, in actions on the case; and they are punishable, if they take money for doing it. 2 *Burr. Rep.* 926. &c.

Ca. sa. against principal in the sheriff's office notice to bail, that plaintiff will proceed against the person; and therefore bail must search whether *ca. sa.* left. 3 *Burr. Rep.* 1360.

Return of *ca. sa.* or filing same, may be at any time before replication. 3 *Burr. Rep.* 1360.

Surrender half an hour before midnight of last day when court risen and no judges in the way, not sufficient in any case. 3 *Burr. Rep.* 1361.

Special bail required on stat. 26 *Geo.* 2. chap. 21. *sect.* 1. 3 *Burr. Rep.* 1569.

No counter affidavits to lessen bail, directed by a judge's order for assault. *Bl. Rep.* 192.

Sci. Fa. against bail may be sued out after *ca. sa.* returned, though not regularly filed, and shortness of notice to bail, immaterial. *Bl. Rep.* 393.

Bail who surrender their principal, need not justify. 2 *Bl. Rep.* 758, 1180. But See 3 *Wils. Rep.* 59. which seems *contra*.

Sci. Fa. on recognizance of bail in *London*, and inrolled at *Westminster*, may be sued, either in *London* or *Middlesex*, 2 *Bl. Rep.* 768.

Bail must pay all costs as well as debt, before proceedings can be stayed. 2 *Bl. Rep.* 816.

Objection

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Objection to bail, in that he lived within the verge of the court. 2 Bl. Rep. 956.

Foreigner being bail, sworn and examined by interpreter. 2 Bl. Rep. 956.

Bail on *test. cap.* from *Middlesex*, put in where party arrested, is no bail. 2 Bl. Rep. 1061.

Bail cannot justify at judge's chambers in vacation. 2 Bl. Rep. 1064.

Bail surreptitiously put in, cannot surrender. 2 Bl. Rep. 1179.

Attorney may be bail, in order to surrender, but cannot justify. 2 Bl. Rep. 1180.

In action of debt on judgment brought by defendant in original action for costs of *non-suit*, he may be held to special bail. 2 Bl. Rep. 1274.

There must be fifteen days between return of the first, and second *sci. fa.* against bail; the return day of the first, must be the teste of the second, between which (the teste) and return, there must also be fifteen days. 2 Bl. Rep. 922.

Special bail required upon reversal of outlawry. 1 Wils. Rep. 3. See 4 Burr. Rep. 2537. &c.

Practice in regard to proceedings against bail. 1 Wils. Rep. 269.

Bail must render principal *quarto die* of return of second *sci. fa. sedente curia*; they come too late to a judge's chambers after rising of the court. 1 Wils. Rep. 270. 4 Burr. Rep. 2134.

Exception may be taken to the bail altho' they be the same persons who were bound to the sheriff. 2 Wils. Rep. 6.

Defendant arrested for money won at play, discharged upon common appearance. 2 Wils. Rep. 67.

Bail

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Bail lost where declaration varies from writ. *3 Will. Rep. 61.*

Bail excepted to, but not struck out of bail piece, if called on, shall have *exoneratur* entered *nunc pro tunc*. *4 Burr. Rep. 2107.*

Sci. fa. against bail must lie four days in the office. *4 Burr. Rep. 2439.*

Common bail in action upon judgment of non-suit, merely for costs. *5 Burr. Rep. 2660, 2661.*

Common bail for that debt and *assumpsit* were joined together in affidavit to hold to bail. *5 Burr. Rep. 2690, 2691.*

Form of a common bail-piece.

This must be engrossed on a treble six-penny stamp piece of parchment, in this form.

*Of Trinity Term in the 27th Year of the
Reign of King GEORGE the Third.*

London, (to wit) A. B. is delivered to
bail upon a *Cepi Corpus*, unto
John Doe of London,
Yeoman, And
Richard Roe, of the
same Place, Yeoman.

H. C.
(according to
the Statute)
Attorney.

At the Suit of C. D.

For

Form of a *special* bail-piece.

*Of the Term of St. Michael in the 27th
Year of King GEORGE the Third.*

Middlesex, (to wit) A. B. is delivered
to bail on a *Cepi*
Corpus, unto
C. D. of, &c. in the
said County, Gent. And
E. F. of, &c. in
the said County, Mer-
cer.

T. W.

Attorney for the
Defendant.

}

At the Suit of C. D,

To be engrof-
fed on a dou-
ble twelve
penny stamp
piece of
parchment
in this form.

There is no difference between the bail-piece
upon an *habeas corpus* and a *cepi*, only you say,
is delivered to bail on an *hab. corp.* to C. D. &c.
If it is a *country bail-piece*, the caption thereon
at the bottom is to be inserted thus: *Taken and
acknowledged the 7th day of May in the year of
our Lord 1787, at Blandford in the county afore-
said, before G. P. a commissioner.* And if it be a bail-
piece

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piece on a *certiorari*, you say, is delivered to bail on a writ *to cause proceedings to be certified*, or writ of *certiorari*.

In action upon bail bond, arrest is not traversable, but issuing writ is. *Say. Rep.* 117.

If any person, disqualified from being bail, be put in, and not excepted to, bail bond cannot be proceeded on, as if no bail had been put in. *Dougl. Rep.* 467. n.

Action on a bail bond given in county *Palatine*, on an action brought there, must be brought in the court below; and not in *B. R.* unless there be special circumstances to warrant it. *1 Burr. Rep.* 642.

Declaration on bail bond, needs not set forth, "that there was an affidavit of debt, or "that sum sworn to, was marked on writ." *1 Burr. Rep.* 332.

Action upon bail bond must be brought in same court, where bail given. *3 Burr. Rep.* 1923. *2 Wils. Rep.* 348. *2 Bl. Rep.* 838. *Barnes* 92. *Burr. Rep.* 642.

For actions on bail bonds. See *Fortesc. Rep.* 363, &c. *Stra.* 399. *2727.* *2 R. Raym.* 1455.

Bail bond cannot be assigned, when original suit out of court, for want of declaring in time. *Bl. Rep.* 876.

On demurrer to declaration on bail bond for contempt, court will not presume no authority to take bail. *2 Bl. Rep.* 955.

Bail bond cannot be put in suit till after four days from appearance day of return of writ. *2 Bl. Rep.* 1009.

Acceptance of assignment of bail bond, waiver of calling on sheriff for return of writ. *1 Wils. Rep.* 223.

Sheriff

Sheriff takes bail bond at his own peril, plaintiff not concluded thereby. 1 *Wils. Rep.* 262.

Bail bond taken in penal sum, more than double the sum sworn to, is good, unless circumstances of oppression. 2 *Wils. Rep.* 69.

Profert is not necessary of assignment of bail bond, nor is it to set out names of witnesses thereto, in the declaration. 1 *Wils. Rep.* 124.

As nothing can be a performance of the condition of a bail bond, but putting in bail, surrender of defendant before return of writ, is no reason for staying proceedings upon such bond. 5 *Burr. Rep.* 2683.

Plea that bail bond was taken for ease and favour, &c. is within the meaning of pleading issuably, in a judge's order. 1 *Burr. Rep.* 605.

3. The declaration is a shewing in writing of the cause of complaint of the plaintiff against the defendant, wherein the party is supposed to have received some wrong: It is an exposition of the writ, with the addition of time, circumstances, &c. and must be true, clear and certain; for the court is not to take things in it by implication.

A declaration is grounded upon the original in the *Common Pleas*, and bill of *Middlesex* or *latitat* in the *King's Bench*; and one may not regularly declare in *K. B.* against a person that is not *in custody of the marshal*, or hath not filed bail; unless he is a privileged person. In action of debt upon a bond, the plaintiff in his declaration must alledge a place where the bond was made, because the jury should come from that place: And if one declare upon an obligation, with a *hic in curia prolat'*, he must, on oyer

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pray'd of it, shew the obligation, or the declaration will not be good. Also a plaintiff, declaring as executor or administrator, ought to set forth the probate of the will, and letters of administration granted, with a *profert in curia*. Dy. 15; 30. 2 Lil. Abr. 412.

If one be in the custody of the marshal of the court, for debt or other cause of action, any plaintiff may file a declaration against him, and he is obliged to plead thereto; and it is the same when he is out upon bail, any other may declare against him, for he is bound to answer every one's suit. Lil. Abr. 413. When a declaration is bad, if the defendant demurs, the plaintiff may set it right in a second action; but if the defendant do not take advantage of it, but pleads in bar, and the plaintiff proceeds to issue thereon; if the right is found for the defendant, the plaintiff is estopped by the verdict from bringing a new action: and so it is if he had demurred to the plea in bar. Mod. Rep. 20, 207.

In real actions, the declaration is called a *count*; and in all actions it is good to lay sufficient damages therein. A plaintiff's attorney may amend his declaration in *K. B.* in matter of form, after the general issue pleaded, before entry thereof, without paying costs, or giving imparlance; but if he amends in substance, he must pay costs, or give an imparlance: and if he amend in substance, after a special plea pleaded, although he would give imparlance, he is to pay costs. Where a declaration is defective, it is sometimes aided by the statutes of *Jeofails*, &c. but they help only matters of form, not matters of substance; for uncertainty in a declaration, which is matter of substance, is not aided

aided by statute after verdict. 5 Rep. 35.
Lil Abr. 409.

All declarations are to be filed, before which they are not of record to warrant a judgment: on filing declarations, copies thereof are served on the defendants, or their attornies, &c. and by an order of all the judges, 12 W. 3. upon delivery or tender of a copy of any declaration, the defendant's attorney shall pay for it after the rate of 4d. per sheet, &c. and if any person refuse to pay for the copy tender'd, the said copy is to be left in the office with the clerk that keeps the files of declarations, and thereupon the plaintiff's attorney giving rules to plead, may for want of a plea sign judgment; and before any plea shall be received, the defendant's attorney is to pay for the copy of the declaration.

If the attorney for the plaintiff does not prepare, engross, and deliver a copy of the declaration to the defendant or his attorney, or file the same with the clerk of the declarations, before the end of the next term after the writ is returnable, the plaintiff may be *non-pross'd*, and the defendant shall have costs. So it is where one comes upon an *habeas corpus*, and bail is given thereon; if the plaintiff doth not declare against him within two terms, including the term the defendant was brought in, the action and the bail are to be discharged, and the plaintiff *non-pross'd* with costs. But if a defendant appears in court in person, at the return of the writ, and it be so mentioned in the bail-piece, the plaintiff must declare within three days, or a *non-pross* may be entered against him with costs, by the stat. 8 Eliz. cap. 2.

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It is *ordered*, that where special or common bail is filed, and notice thereof given, a copy of the declaration shall be delivered to the attorney for the defendant, who is to pay for the same, or on refusal, or not knowing where he lives, it may be left in the office, and notice of it must be forthwith given to the defendant; and such declaration shall be held well delivered from the time of such notice only: and where the cause of action is specially expressed in any writ, by virtue of which the defendant is arrested, and the plaintiff having declared; the defendant shall plead within the usual time, without imparlance, as by original. And if the defendant lives within 20 miles of *London*, the declaration shall be delivered with notice to plead in four days after the delivery thereof; and if he lives above 20 miles off, the declaration is to be delivered with notice to plead in eight days after delivery; and on default of pleading in those times, the plaintiff may sign his judgment. *Ord. K. B. Trin. & Hil. 2 Geo. 2. And Trin. 5 & 6 Geo. 2.*

Where the copy of the process is served upon any defendant, and the plaintiff's attorney enters an appearance for him, pursuant to the act of parliament, a copy of the declaration shall be left in the office, and an *English* notice delivered the defendant, signifying the nature of the action, and in whose office the declaration is left, &c. and that unless the defendant plead within four days, &c. Judgment will be entered against such defendant by default: and if the defendant does not plead by the time the rules for pleading are out, the plaintiff shall sign judgment, without any further calling for a plea; and thereon notice may be given of executing a writ of inquiry, by delivering it to the defend-

defendant, or leaving the same at his last or usual place of abode. *Ord. C. P. Mich. 1 Geo. 2.* See *Ord. East. 3 Geo. 2.*

Declaration good, tho' no bill filed, for one must have been filed at time of delivery. *Say. Rep. 49.*

A new count cannot be added to a declaration after two terms, but by amending the same. *Say. Rep. 172, 235.*

Declaration, that defendant used a gun being an engine to kill and destroy game, is good, after verdict; *Quare*, if so, after special demurrer. *Cowp. Rep. 825.*

Declaration against one defendant only, that he and another made their promisory note, by which they jointly or severally promised to pay, good. *Cowp. Rep. 832.*

Plaintiff cannot take *de bonis testatoris*, upon a declaration against the defendant, in his own right. *Cowp. Rep. 292.*

Variance in declaration of *assumpsit*, for money given by judicature established by special act of parliament, is fatal. *Cowp. Rep. 474.*

Declaration against defendant as assignee of all the estate, &c. in certain premises, evidence of being assignee of part only, a fatal variance. *Cowp. Rep. 766.*

Where the gist of the action is not laid in the declaration, a verdict will not aid. *Cowp. Rep. 826.*

Delivery of declaration should be to attorney and not to the party. *Loft's Rep. 332.*

Declaration *de bene esse*, may, in certain cases, be delivered at return of process, with notice for defendant to plead within eight days after such delivery; and if defendant shall not file common bail, and plead within such eight days; plaintiff having first filed common bail

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for defendant, may sign judgment for want of a plea, rule to plead being duly entered. 1 *Burr. Rep.* 55, 56.

Sundays not reckoned part of the eight days. 1 *Burr. Rep.* 56.

Leaving declaration in office, good delivery thereof. 1 *Burr. Rep.* 56, 57.

In the above case, no fresh notice, or rule necessary. 1 *Burr. Rep.* 56.

Judgment signed six weeks after such delivery of declaration, *de bene esse*, regular. 1 *Burr. Rep.* 56.

Plaintiff may recover less than laid in the declaration, but not more. 2 *Burr. Rep.* 906.

Amendment of declaration in civil actions may be made at any time whilst all is in paper. 2 *Burr. Rep.* 1098.

Declaration relates back to the first day of term, if it has no special memorandum. 3 *Burr. Rep.* 1243. unless circumstances on record, refer it back to subsequent return in term, and then to essoin day of that return. 2 *Bl. Rep.* 735. 1 *Durnf. & East's Rep.* 116.

Declaration on *sci. fa.* to revive judgment, returnable, last return of term, may be intitled of same term generally. 3 *Wils. Rep.* 154.

If same plea may be pleaded, and same judgment given on several counts, they may be joined in one declaration. *Durnf. & East's Rep.* 274.

If defendant is in court in virtue of a proceeding by bill, either by being in actual custody of the marshal, or by voluntary appearance, any person may deliver declaration by the by against him, within same term, wherein writ was returnable. 4 *Burr. Rep.* 2181.

On amending declaration, defendant intitled to new rule to plead. 2 *Bl. Rep.* 785.

If

If declaration be delivered *de bene esse*, on or before appearance day, defendant entitled to four days time to plead from appearance day; if after, to four days, from delivery. 2 *Bl. Rep.* 1243.

If declaration filed, plaintiff need not receive defendant's plea, till he take declaration out of the office, and pay for it. 1 *Wils. Rep.* 173.

Where cause of action appears upon declaration, to be for 20s. only, proceedings stayed. 3 *Burr. Rep.* 1392. See 1 *Bl. Rep.* 207.

All pleadings are either general or special; a general plea is drawn on a little piece of treble 3d stamp'd paper, having only the defendant's attorney's name to it, thus: In debt, *He owes nothing*; or if by bond, *'Tis not his deed, &c.* In case, *He hath not promised*: In trespass, *Not guilty, &c.* And special pleas are drawn up in form, setting forth the matter pleaded at large, with a proper conclusion to the declaration or action; and must be signed by counsel; they are of two sorts, pleas in abatement, and in bar. A plea in abatement begins, *That the defendant ought not to answer the bill, &c.* And it concludes in this form; *Whereupon he prays judgment of the bill, or declaration aforesaid, &c.* The plea in bar begins; *That the plaintiff ought not to have or maintain his action*: And concludes to the action, viz. *He prays judgment if he ought to have or maintain his action against him, &c.*

When a defendant hath pleaded, the plaintiff answers the defendant's plea, which is called a *replication*: This must contain certainty, and not vary from the declaration, but must pursue and maintain the cause of the plaintiff's action; otherwise it would be a departure in pleading. The defendant answers the plaintiff's replication
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by *rejoinder*; and it ought to be a sufficient answer thereto, and enforce the matter of the bar pleaded; if he departs from the plea, the rejoinder is not good. The plaintiff may answer the rejoinder by a *surrejoinder*; also sometimes, though seldom, pleadings come to *rebutter* in answer to the surrejoinder, &c. A faulty plea in bar, in some cases is made good by a replication; and the replication may be allowed good by a rejoinder; but not where they want substance. *Co. Lit.* 304.

After all the above pleadings, there may be a *demurrer* in law: And where the defendant has pleaded in abatement, before he pleads directly in bar, he may demur to the plaintiff's declaration; and refer the points of law that arise thereupon to the judgment of the court, which determines all questions arising on such demurrers. A demurrer is to be signed, and argued on both sides by counsel; and when it is joined the plaintiff enters it, &c. and paper books are delivered to the judges: And on a general demurrer, the party confesseth all matters of fact, that are well pleaded. These demurrers alledge insufficiency in law in the other party's declaration, plea, &c. and if special, say, *That it ought not to be answered, because, &c. and therefore prays judgment*: And if the matter be found insufficient, judgment is against him that joined in the demurrer, but if it appear sufficient, judgment is given against the demurrant. Where the points on a demurrer are apparent and easy to determine, the court will proceed to give judgment upon it presently; but if it be doubtful or difficult, they will take time to consider thereof, and give a day to the parties: And sometimes all the judges of *England* are consulted.

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By statute, no dilatory plea shall be received in any court of record, unless the truth of it be proved by affidavit, or probable matter is shewn: And the causes of demurrer are to be specially set down, or the judges shall give judgment without regarding imperfections in any writ, pleading, &c. so as sufficient matter appears. *Stat. 4 Ann. c. 16.*

A defendant is to demur where he may do it, for if in such case he pleads, he shall not afterwards take advantage in arrest of judgment, &c.

Pendency of prior action may be pleaded in bar, but not in abatement. *Say. Rep. 216.*

Every fact in a plea of privilege, must be verified by affidavit. *Say. Rep. 19.* which must be positive. *Say. Rep. 293, 294.*

Demurrer, unless for good cause, is not an issuable plea, within meaning of order to plead such plea. *Say. Rep. 88. 3 Burr. Rep. 1788, 1789.*

Leave given to plead two seemingly (1) immaterial pleas. *Say. Rep. 29.*

(1) *Lee* chief justice *B. R.* observed, that it was not usual for that court, upon motion for leave to plead several matters, to go into consideration of the *materiality* of the pleas, and that the doing thereof, would open a door for almost endless altercation; that courts were formerly a little strict, as to giving leave to plead several matters; but that it had of late years been the practice, to give leave to plead any number of pleas, provided no two of them were inconsistent with each other. *Say. Rep. 29.*

It may not be improper to observe further in this place, that for two or three years past, the court of *C. P.* has been strict, as to giving leave to plead several matters; it is not at this day (*viz. A. D. 1775.*) sufficient in the last mentioned court, that the matters intended to be pleaded, are all *material*; but the court expects to be satisfied of the necessity to plead several matters, before a rule is made to shew cause why they should not be pleaded. *Say. Rep. 29.*
Note by Editor.

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Infancy or release may be pleaded, or given in evidence. *Say. Rep.* 270.

If *touts temps prist* be pleaded by administrator, he must aver that his intestate was at all times, from time of making promise to that of his death, ready to pay; and that he has at all times, since death of his testator, been ready to pay. *Say. Rep.* 18.

Plea cannot be waved on last continuance day, without leave of the court. *Say. Rep.* 87.

Marriage before last continuance day, cannot be pleaded, in plea of *puis darrein continuance*. *Say. Rep.* 268.

Non assumpsit infra sex annos, is a special plea. *Say. Rep.* 97.

Riens in arriere good plea to an action of debt, but not to an action of covenant, for rent. *Cowp. Rep.* 568.

Nothing can be pleaded in bar, to a *sci. fa.* on a judgment, which might not have been pleaded to the original action. *Cowp. Rep.* 728.

Two affirmatives cannot make an issue. *Dougl. Rep.* 60.

In declaring on a deed, necessary to state so much of deed only, as shew title to action, and that not *verbatim*, but only according to the legal operation. *Dougl. Rep.* 667.

Plea of tender [*1 Burr. Rep.* 52.] is but plea in abatement not within meaning of pleading issuable, in a judge's order. *1 Burr. Rep.* 605.

Promissory note of hand is not a plea in bar to an action upon simple contract, but a bond is, and yet one bond cannot be pleaded to another. *1 Burr. Rep.* 9.

Where whole plea is desired, replication must conclude to the country; where only particular

lar fact denied, it must conclude with an averment. 1 Burr. Rep. 320.

Where corrupt agreement pleaded, replication may be, that bond was given upon another account; and corrupt agreement traversed, with an *absque hoc*, as may deny corrupt agreement directly, and conclude to country. 1 Burr. Rep. 320, 321.

If re-pleader be awarded, it must be without costs. 1 Burr. Rep. 304.

Pleading issuably, means pleading such an issue as plaintiff may try cause on. 2 Burr. Rep. 782.

Withdrawing replication, and replying *de novo* permitted after six terms. 2 Burr. Rep. 755, 756.

Concluding with an averment, instead of concluding to the country only form, and to be shewn on demurrer only. 2 Burr. Rep. 774.

Where affirmative and negative are not applied to same thing, conclusion needs not be to the country. 1 Burr. Rep. 775.

Where both affirmative and negative, conclusion must be to the country. 2 Burr. Rep. 1022.

Costs of amendment of plea, shall be allowed in proportion to necessary alterations only, if it requires such slight alteration, as not to deface record. 2 Burr. Rep. 757, 758.

One custom may be pleaded against another, where both consistent. 1 Bl. Rep. 49.

Misnomer after special imparlance. 1 Bl. Rep. 51.

Insimul computasset no bar to *assumpsit*. Bl. Rep. 65.

Payment before the day not immaterial plea, in debt on bond to pay on or before the day.

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1 *Bl. Rep.* 210. 2 *Burr. Rep.* 944. 2 *Wils. Rep.* 173. S. P.

Unnecessary length of pleading censured.

1 *Bl. Rep.* 270, 291. See 2 *Burr. Rep.* 774.

Leave to withdraw plea of *non est factum*, and plead infancy. 1 *Bl. Rep.* 357.

Judgment in C. B. if not true in fact, no issuable plea within a rule for time. *Bl. Rep.* 376.

Month's time to plead, means a lunar month.

3 *Burr. Rep.* 1455.

Plea of *nul tiel* record need not be signed by a serjeant. 2 *Bl. Rep.* 816. 2 *Wils. Rep.* 74.

Demurrer on merits, is an issuable plea within the meaning of an order for time. 2 *Bl. Rep.* 923.

Jurisdiction cannot be pleaded to, after appearance by attorney. 2 *Bl. Rep.* 1094.

Misnomer cannot be moved in arrest of judgment. 2 *Bl. Rep.* 1120.

Non assumpsit, and tender not allowable under rule to plead several matters. 2 *Bl. Rep.* 723. Nor

Non est factum, and payment after the day. 2 *Bl. Rep.* 905. Nor

Non assumpsit and alienage. *Bl. Rep.* 1326. Nor *ne unques seisie*, and *ne unques accouple*. *Bl. Rep.* 1157, 1207. But

Not guilty, and tender of amends, allowable. 2 *Bl. Rep.* 1093. So,

If one count in declaration be good, plaintiff shall have judgment on demurrer. 1 *Wils. Rep.* 252.

Nil debet to a bond is bad upon a general demurrer. 2 *Wils. Rep.* 10.

A term must be pleaded to be by deed. 2 *Wils. Rep.* 49.

It is a rule in pleading, that where plaintiff replies new matter, he must conclude with an averment. 2 *Wils. Rep.* 66.

Whoever claims on easement, must plead it specially. 2 *Wils. Rep.* 173.

Practice as to being bound to plead issuably by a judge's order. 2 *Wils. Rep.* 117.

Plea of payment before the day, on debt upon bond, is ill upon demurrer. 2 *Wils. Rep.* 250.

Plea of justification under process, must shew it was returned. 1 *Wils. Rep.* 17.

Sham plea not a special plea 1 *Wils. Rep.* 29.

Leave to withdraw *non est factum*, to bond, and to plead statute of gaming. 1 *Wils. Rep.* 177.

Duplicity in a plea, must be shewn. 1 *Wils. Rep.* 219.

Defendant permitted to plead special justification upon terms, after general issue. 1 *Wils. Rep.* 254.

After plea in abatement and demurrer, plaintiff must pray *respond. ouster*, and not judgment in chief. 1 *Wils. Rep.* 302.

Nil hab. in ten. bad plea to *ass.* for use and occupation. 1 *Wils. Rep.* 314. *Say. Rep.* 13. S. C.

How records of inferior courts to be pleaded. 1 *Wils. Rep.* 218. *Say. Rep.* 17.

Practice as to plea in abatement. 1 *Wils. Rep.* 16.

Where bail filed, plea must be demanded in writing, the notice to plead be indorsed on declaration. 1 *Wils. Rep.* 134.

All the pleadings in a writ of right patent. 3 *Wils. Rep.* 541, &c.

After time to justify bail, and rule to plead issuably, &c. plea of recovery, in *B. R.* set aside with costs. 3 *Wils. Rep.* 33.

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Four days for pleading in abatement, both inclusive. *Durnf. and East's Rep.* 277.

Demand of plea, before appearance, a nullity. *Durnf. and East's Rep.* 638.

Matter of substance must be pleaded. 4 *Burr. Rep.* 2469.

Separate action, where it ought to be joint, must be pleaded. 5 *Burr. Rep.* 2613.

As to actions *on the case*, or, in the true legal term, a *special action of trespass upon the case*.

For wrongs or injuries unaccompanied by force, there is a remedy in damages by the above action. It is an universal remedy for all personal injuries *without force*; so called, because the plaintiff's *whole case* or cause of complaint is set forth *at length* in the original writ. For tho' in general there are methods prescribed and forms of actions previously settled, for redressing those wrongs which most usually occur, and in which the very act itself is IMMEDIATELY prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining goods, or the like; yet where any special CONSEQUENTIAL damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the *Stat. of Westm.* 2. c. 24. to bring a special action *on his own case*, by a writ formed according to the peculiar circumstances of his own particular grievance. FOR WHEREVER THE COMMON LAW GIVES A RIGHT OR PROHIBITS AN INJURY, IT ALSO GIVES A REMEDY BY ACTION; (1 *Salk.* 20. 6 *Mod.* 54.) therefore, whenever a *new injury* is done, a new method of remedy must be

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As to the kinds of this action, they are as various as the torts and injuries upon which they are founded; but on a general division may be reduced to the heads of,

1. Nonfeasance on promises.
2. Malefeasance, or doing what ought not to be done.
3. Misfeasance, or misdoing any thing.
4. Deceits on contracts, &c.
5. Particular-nusances.

1. As to *nonfeasance*, which is the omission of that which a man ought to do; if there be a charge upon any person, by reason of his tenure of house or land, to repair any bank, bridge, or private way, &c. and he doth it not, and thereby another receives special damage, he may have action on the case against him: so where a man is bound by tenure to repair sea-banks, and he neglects it, so that the land of his neighbour is drowned; or when one bound by prescription to make his hedge next my lands, doth it not, whereby other men's cattle

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come into my ground to my damage, &c. And for not paying of toll of a mill or market, &c. this action lies. *Co. Ent.* 11. *10 Rep.* 139. *2 Salk.* 112.

Where a man doth not make a good estate of land sold, according to promise; or do not pay money upon a bargain and sale, according to agreement; or not deliver goods upon promise, or demand, action of the case lies on an express *assumpsit*, which may relate to one's real or personal estate, or to a man's person: and implied *assumpsit* is where goods are sold, or work is done, &c. without any price agreed upon; here the law implies a promise and satisfaction to the value. But for breach of promise made by deed, writ of covenant is to be brought; and upon promise of payment of money on a bond, unless there be a collateral promise, action of debt lieth; and on a bill of exchange accepted, an action lies on the custom only. *Danv. Abr.* 28. *Rol. Abr.* 517. *Vent.* 152.

If one desires me to be bound for him, and he afterwards doth not save me harmless, this is *non-feazance* implied by law; and action of the case lieth. And this action lies against an inn-keeper that refuses to entertain a guest or traveller, on pretence of his house being full, if this be false: also against a smith refusing to shoe a horse, having necessities for doing it; and against a sheriff for not arresting a person, being present, &c. *Brownl.* 32, 213. *Dy.* 158.

2. *Malefeazance* is where any man does a voluntary tort or injury to another: if a man in riding a horse hurts another person, &c. Or, if any one keeps a dog used to bite men and cattle, and knowing thereof continues him unmuzzled; and I, my child, servant, or cattle are bitten,

bitten, whereby I suffer damage, this action lies against the owner. *Dy. 25. 4 Rep. 188.*

If a man is disturbed or hindered in the use of a way to his house or ground, &c. or in putting cattle into a common, he may have an action on the case. And if one commoner surcharge the common, the rest of the commoners, if they cannot have their common as usual, may bring action of the case against him: So where one digs pits or trenches, &c. in the common, by which cattle go in danger of their lives. And for inclosing a man's common, where the damage occasioned by it is special. *2 Bulst. 121. Stile 164.*

Where the parson or any stranger disturbs a person in the using a seat or stile in a church, which he hath an appendant to his house: Or where one is disturbed in his office, or the profits thereof, this action lieth. And when franchises or liberties, are under disturbance from any: If any one shall hinder a person that has the franchise of the execution and return of writs or process, in a hundred, liberty, &c. or shall disturb an officer in making an arrest, or in attaching or distraining of goods, action of the case lies: But if a man himself do any act to prevent execution upon his own goods, &c. this action doth not lie. *Co. Entr. 9. F.N.B. 102. 5 Rep. 91.*

For erecting a new-market, to the damage of another, &c. And if any person shall entice away a servant, apprentice or an apprentice maid, &c. whereby the master or mistress loses their service, and have damage, action on the case lies for the same. *Lev. 296. 2 Inst. 198. 2 Saund. 169.*

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3. *Misfeasance* may concern a man's house or lands, or his cattle, goods, &c. If my servant puts a candle or other fire in any place in my house, and this burns all mine and my neighbour's house, action of the case lieth against me: And if a man in burning of heath keep his fire so negligently, that the close of another is burnt down, this action lies; for every man is to take care that his fire does his neighbour no damage. But action is taken away in case of accidental fires, by statute. *Danv. Abr.* 10. 2 *Inst.* 303. *Rep.* 13. 6 *Ann. c.* 31. *sect.* 6. perpetuated by 10 *Ann. c.* 14.

If a common carrier takes goods to carry, and wilfully spoils them, or negligently loses or suffers them to be lost or spoiled, action on the case lies: 4 *Burr. Rep.* 2827. So it does for damage to goods, he or wharfinger undertakes to carry for hire as they thereby respectively take upon themselves the safe delivery of the goods; though without any actual negligence of either they are yet at all events liable, except the damage arises from the act of God, or of the king's enemies. *Durnf. and East's Rep.* 27. and though the carrier or wharfinger be not acquainted with all the particulars in a box, &c. where there is money, he shall answer in an action, if robbed; unless there be a special agreement or acceptance to excuse him. If a waterman or lighterman lose goods, this action lies against such water-carrier; but goods may be thrown over-board in a tempest, to preserve the lives of the passengers, &c. The over-loading an horse, or surcharging a boat, is actionable, if there be a damage by it. *Fitz. Abr.* 14. *Rast. Entr.* 484. 2 *Bull.* 28. *Danv. Abr.* 13.

Action of the case will lie against an inn-keeper for goods stolen in his house; and here the

the inn-keeper is chargeable, although the guest doth not acquaint him what goods or money he hath; and tho' he deliver the key of the chamber to the guest, and knows not the persons doing it, &c. But the person robbed must be a traveller, and guest in the inn, or an action will not lie. A man coming to an inn, leaves goods there, and goes away for two or three days; in this case he is no guest; and therefore if they are stole, no action lieth; though the leaving a horse, &c. by which the inn-keeper hath gain, makes the owner a guest; and the inn-keeper answerable. 8 Co. Rep. 33. Moor 877.

This action lieth, where an inn-keeper lets a man's horse to hire without his leave: And when a horse that is hired, is abused by the rider, by riding an excessive pace, or further than agreed, neglecting to take care of him, &c. action of the case may be brought; not if the horse die suddenly, without the rider's default. And if a farrier undertake the cure of my horse; or a smith the shoeing thereof, and doth it not well, as if he prick the horse so that I lose the use of him, &c. for these action on the cases lies. Brownl. 8, 9. Fitz. 94. 2 Bulst. 334.

If a chirurgeon neglects his patient, or gives him unwholesome medicines, whereby the patient receives injury, &c. this action lieth: Also against him and an apothecary, for unskilfully diminishing the callous of the bone of their patient's leg, after being set. 1 Wils. Rep. 388: so where a taylor undertakes to make a suit of clothes, and he spoils them; and when one undertaking to build a house, does it ill; or if a carpenter promises to mend my house before a certain day, and neglects to do it, by rea-

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son whereof my house falls, it is actionable.
Daru. Abr. 32.

Where a counsellor doth not come to plead his client's cause, being retained to appear, by which the cause miscarries. If an attorney engages in a suit without warrant, or out of negligence or ignorance mismanage a cause, or if he plead otherwise than he hath authority to do, or make default, &c. or in case any attorney or other officer do any thing contrary to his trust; for malicious prosecution; and where any suit is without ground; and for false imprisonment, &c. In all these cases, action of the case lieth. Also if a sheriff, &c. refuse to do, or do any thing amiss relating to his office, to the damage of another; or shall make a false return of process, &c. this action may be had. *6 Rep. 9. Dy. 361. 5 Rep. 89.*

4. For deceits of attornies, &c. in discovering evidences, or other secrets, to the prejudice of their clients; or if an attorney do a thing in his own name, or for his own use, which he ought to do for me in my name, &c. A man personating another in any court or other place, to his injury; counterfeiting letters, to receive money; cheating others at play, with false dice, &c. and for all deceits in contracts, action on the case lies. *Dy. 25, 75.*

If a vintner sells wine for good, knowing it to be bad, this action lieth: so if a man sells certain packs of wool, as good and merchantable, if they are damaged; or if one promise for money to deliver me that which is good, and doth not; and where a person sells to another cattle or goods, that are not his own; for selling by false weights and measures, or warranting clothes to be of such a length, that are deficient

cient of it; selling a horse, &c. affirming it to be sound, when it hath some secret disease; or unwholesome bread, beer, meat, &c. *Danv. Abr.* 173, 187. *Cro. Jac.* 196, 471.

And in some cases this action arises upon the warranty of the seller, and in others it will lie without warranty; but if the buyer taste the wares before-hand, and like and accept them, &c. without a warranty, no action lieth: And 'tis said action of the case lieth not, altho' they are warranted, when the fault is so apparent that the buyer may discern it; for the law gives no remedy for a man's own voluntary negligence. It is the same when the warranty is after the thing is sold, so that 'tis no part of the contract; and where any warranty doth extend to a thing to come, as that a horse shall carry a man so many miles a day, or the like. *Cro. Jac.* 631.

3 *Bull.* 94. 13 *H.* 4. *Finch.* 187.

The bare affirmation of a particular sort of diamond, if the seller doth not warrant it, will not maintain an action: But where a man hath the possession of a personal thing, the affirming it to be his own, is a warranty that it is so: 'tis otherwise in case of lands, where the buyer must see that he hath title. For all deceits used by tradesmen in their trades; and if goods in pawn are refused to be delivered, on offering the money, &c. action on the case may be had. *Cro. Jac.* 4, 196. *Salk.* 210. 4 *Rep.* 18. *Lord Raym.* 593.

5. For a particular nuisance to a man's house, water, way, light, or air, by building, diverting, stopping, digging, &c. whereby he is damnified, action of the case lieth. If one builds his house, so that the eaves thereof hang over and drop upon mine, and cause it to perish, or otherwise trouble my dwelling therein: Or if a man erect

a house, upon a new foundation so near to my house, that he stops up my window, and takes away my light; I may have action of the case against him; but not if the building be on an old foundation, where there was a house before. *Co. Lit. 56. Bull. 116.*

The erecting of a glass-house, a brew-house or an house of office, &c. may be a nuisance for which he, that hath any damage thereby, may bring this action: Where a man hath a water running to his house or land for his necessary use, and another stops or turns it; or in case a tanner erects a lime-pit near the water-course, so that the corruption of the pit spoils the water; if dye-houses are erected, the filth of which destroys fish in a river; or if any tallow-chandler sets up a furnace near an inn, and the stink annoys the guests; hogs are kept in an hog-stye near a man's parlour, whereby he loses the benefit of it, &c. These are nuisances, for which action lieth: and an action upon the case lies, for hindring of the wholesome air, as well as for corrupting of it. *2 Rol. Abr. 140. Yelv. 48. 159. 9 Rep. 58.*

Building a smith's forge near another's house, and making noise with hammers, was held a nuisance; although the smith worked at seasonable times, and had been a blacksmith above twenty years in that place, &c. For though a smith is a necessary trade, and so a lime-burner, and hog-merchant; yet they must be used not to be injurious to the neighbours; or action of the case lieth: also any persons may abate or remove nuisances, that are prejudiced by them, *Lutw. 69.*

For the breaking down a wall, or sluice: or if one break down the bank of a river, &c. *Alfg*

Also for damming up rivers, or throwing stones or rubbish therein; and stopping, or not scouring of a ditch, &c. action on the case lies. And the continuation of a nuisance, is as it were a new nuisance: but for a common nuisance to a highway, and annoyances of rivers, bridges, &c. common to every body, the remedy is not by action, but by presentment or indictment. *Dy. 248. Co. Lit. 402.*

A man shall not have private action for a common or public nuisance. *Lofft's Rep. 556.*

Person injured by a nuisance may not abate the whole of it, where it arises only from excess; but only so much of it, as by it's excess, above what allowable, constitutes the nuisance. *1 Burr. Rep. 267, 268.*

Who may or may not abate a nuisance. *2 Wils. Rep. 58.*

Indictments for nuisances must be demurred to, they are not quashed on motion. *4 Burr. Rep. 2116.*

Owner of house, altho' he be not in possession, may maintain an action upon the case, for stopping up the windows of the house. *Say. Rep. 216.*

Action on the case lies against the Bank, &c. for refusing to transfer stock. *Doug. Rep. 524.*

Action on the case proper remedy for fraud upon the toll of a market. *Cowp. Rep. 664, 665.*

By a master for beating his servant, or by a father for beating his child, will not lie, unless it be added, "*per quod servitium amisit.*" *3 Burr. Rep. 1879.*

Father cannot maintain an action, for assaulting his daughter, she being adult, and then in the

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the service of another person; and getting her with child, "*per quod servitium amisit.*" 3 Burr. Rep. 1878.

Action for malicious prosecution, must be grounded on express or implied malice, and want of probable cause. 4 Burr. Rep. 1974.

Action on the case is a liberal action. 2 Burr. Rep. 906, 1011, 1012.

Action of *assumpsit* will lie in many cases, where debt will, and in many where it will not. 2 Burr. Rep. 1008.

This species of *assumpsit* lies in many instances, for money received from a third person, under lawful authority. 2 Burr. Rep. 1008, 1009.

This action lies only for money which defendant *ex equo et bono*, ought not to keep. 2 Burr. Rep. 1011, 1012.

Assumpsit lies for money paid by mistake; or upon a consideration that fails; or for money obtained by imposition, extortion, oppression, or any undue advantage. 2 Burr. Rep. 2012.

Action upon the case lies for maliciously suing out a commission of bankrupt. 3 Burr. Rep. 1418, 1419. 2 Wils. Rep. 145. 1 Black. Rep. 427. 6 Com. Dig. 68. Green. 293. n.

Case in nature of waste, will lie against tenant for years after expiration of the term. 2 Bl. Rep. 4.

Case and trover may be joined. 2 Bl. Rep. 848.

Action commenced as a town cause, not objected to, to be considered as such throughout. 2 Bl. Rep. 992.

Action lies for suing in inferior court not having jurisdiction of cause. 2 Wils. Rep. 302, 376.

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In an action upon the case, complaint is made of a wrong in consequence of another act. 2 *Wils. Rep.* 313.

Action does not lie against a commanding officer in *Germany*, for reducing a serjeant of the guards to a common soldier, there, *Germany* being out of the king's dominions. 2 *Wils. Rep.* 314.

Action lies against a common law practiser for neglecting to charge a person in execution, though rather for want of judgment, than from neglect. 2 *Wils. Rep.* 325. 3 *Burr. Rep.* 1788. 4 2060. S. C.

Action for money had and received to plaintiff's use, does not lie for *India* stock. 5 *Burr. Rep.* 2592.

Action upon the case lies against deputy post-master for non-delivery of letters gratis in a country post-town. 1 *Wils. Rep.* 443. 2 *Bl. Rep.* 906. 4 *Burr. Rep.* 2153, 2154. 5 2715, 2716.

Action upon the case lies against pavours employed by parliamentary commissioners for paving streets, for raising pavement in front of houses, whereby their passage and lights are obstructed. 3 *Wils. Rep.* 461. 2 *Bl. Rep.* 906. S. C. S. P.

Indeb. ass. will lie for tolls. *Durnf. and East's Rep.* 616.

Assumpsit lies for money had and received, when payment has been made on a contract put an end to. *Durnf. and East's Rep.* 133.

All actions of a transitory nature, cause whereof arises abroad, may be laid as happening in an *English* county. *Cowp. Rep.* 177.

Actio personalis moritur cum personâ, is a maxim not generally, much less universally true. *Cowp. Rep.* 371.

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Action will not lie for a malicious prosecution, without shewing in declaration, original suit to be determined. *Dougl. Rep.* 215.

Action of account is of late very much disused, since it is found by experience, that the most ready and effectual way to settle matters of account is by bill, in a court of equity, where a discovery may be had, on defendant's oath, without relying merely on the evidence, which the plaintiff may be able to produce; though when an account is once stated, nothing is more common than an action upon the implied *assumpsit*, to pay the balance.

Assumpsit on an account stated, does not lie against an infant. *Durnf. and East's Rep.* 40.

Allowance of simple contract debt, in a settled account cannot be pleaded in bar of *indeb. ass.* *Say. Rep.* 270.

Account stated is not a plea in bar to demand of debt of same degree. *1 Burr. Rep.* 9.

Action of covenant is brought where a man is bound by covenant in a deed, entered into by two or more persons to do, or not to do some act or thing agreed betwixt them, when he hath broke the same; and is divided into,

1. Covenant personal for doing any thing,
2. Covenant real concerning lands,

1. A covenant between persons must be to do what is lawful and possible, or it will not be binding: and in such case, where there is any agreement under hand and seal, action of covenant may be brought on it; and if one is party to a deed, his agreement to pay amounts to a covenant. *2 Mod.* 91.

Upon a bond action of covenant lies, it proving an agreement; and if a person covenants

to pay another a certain sum of money at a day, tho' he may bring action of debt for it, yet may writ of covenant be had at his election: but when only a hand is to a writing, and not a seal, covenant lieth not, but action of the case upon breach of the agreement. And by release of all covenants from the covenantee, a covenant is discharged, with the action thereon, &c. 2 *Danv. Abr.* 228. *Lil.* 346. *Allen* 39.

If a man covenant with one to pay him money on a time to come, and do not say to his executors, &c. If the covenantee die before the day, his executors or administrators shall have action of covenant for the money, and recover the same: also in every case where a testator is bound by a covenant, the executor shall be liable, if it be not determined by the testator's death. Not only parties to deeds, but their executors and administrators, may take advantage of covenants: but there may be an agreement and covenant, only to be performed by the parties themselves. *Dy.* 12. 5 *Rep.* 16. *Cro. Eliz.* 552. 2 *Danv. Abr.* 235.

In deeds and articles of covenant, sometimes a clause for performance, with a penalty, is inserted; and other times, and more frequently bonds are given for the performance, with a sufficient penalty, separate from the deed; which last being sued, the jury must find the penalty, but on covenant the damages only. And commonly the party damnified in this action shall recover nothing but damages for the breach, except real actions. *F. N. B.* 145.

If covenant be to pay one of two things, at election of payee, and breach assigned in action of covenant be, that neither was paid, it is not necessary

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necessary to be alledged in declaration, that election was made. *Say. Rep.* 232.

In covenant, that apprentice shall not absent himself from master's service, receiving apprentice after absence, may be given in mitigation of damages. *Say. Rep.* 116.

Where there are mutual covenants, defendant cannot take advantage of non-performance of plaintiff's covenant, by way of set off, unless it was for payment of money. *Cowp. Rep.* 56.

When judgment for a penalty shall stand as security for damages by non-performance of covenants. *Cowp. Rep.* 357.

Issue cannot be joined on a general averment of performance. *Cowp. Rep.* 578.

In declaration on covenant, so much only of the substance of the deed and covenant shall be set out, as will shew plaintiff's title. *Cowp. Rep.* 665.

If more be inserted, court will refer to master to strike it out with costs, and will censure the special pleader. *Cowp. Rep.* 665, 727.

If lessee covenant not to under-let without consent of lessor by deed with power of re-entry in case of breach; acceptance by lessor, of rent due after condition broken, with full notice, waiver of forfeiture. *Cowp. Rep.* 803.

Covenant of lessor and his ancestors, to renew at the same rent, and under the same covenants, repeatedly inserted in different renewals of lease for lives, construed and held, though doubtfully worded, a covenant for a perpetual renewal. *Cowp. Rep.* 819.

Independant covenants cannot be set off. *Loffi's Rep.* 198.

Reciprocal covenants are, where one is to do such an act, the other doing such an one, and both are simultaneous. *Loffi's Rep.* 198.

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Non infregit conventionem, not an issuable plea to a breach of covenant, assigned in the negative. 2 *Bl. Rep.* 1312.

One party covenanting to do one thing, cannot be pleaded in bar, to the other covenanting to do another thing; this not being a condition precedent, but a mutual covenant. 2 *Bl. Rep.* 1312.

In a building and repairing lease, to leave demised premises, with all new erections, well repaired, construed to extend to new erections only, money being agreed to be laid out, in new erections and rebuilding; and covenant to keep in repair, extending only to new erections. 1 *Burr. Rep.* 290, 291.

Express covenant binding, implied one not. 3 *Burr. Rep.* 1640.

Attornment need not be averred, in declaration of covenant for rent. *Dougl. Rep.* 283.

Covenant not revocable, as a will. 3 *Burr. Rep.* 1256.

Covenant to stand seized to uses, is not a revocation of a will. 3 *Burr. Rep.* 1256.

Covenant to stand seized, may be a lease. 3 *Burr. Rep.* 1446.

Covenant for non-payment of rent referred to master, and on payment, proceedings to stay. 1 *Wils. Rep.* 75.

What covenants run with the land, and what not. See 3 *Wils. Rep.* 27, 28, &c.

Lessee for years covenants not to assign, making an under lease for part of the term, not a breach. 3 *Wils. Rep.* 234.

One covenant cannot be pleaded in bar of another. 3 *Wils. Rep.* 387.

Assignee of lease assigned after covenant broken, by lessee, not liable for the breach. 1 *Bl. Rep.* 351. 3 *Burr. Rep.* 1271.

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Lessee covenants to pay rent, and to repair, with exprefs exception of casualties by fire, is liable upon the covenant, though the premises are burnt down, and not rebuilt by the lessor, after notice. *Durnf. and East's Rep.* 310.

2. Where it is agreed, that one man shall pay 100 L. to another for lands in such a place, this is a mutual real covenant; and action of covenant lies, if the other party refuses to convey, &c. And when covenants are distinct and mutual, several actions may be brought against the parties; but if there be mutual covenants, and the one not to be performed before a covenant precedent, there the covenant is not sueable till the other is performed. *Sid.* 423. *2 Mod.* 74.

A person covenants expressly to repair a house, and it is burnt down by lightning, or any other accident, yet he ought to repair it, or action of covenant lies against him; for it was in his power to have guarded against it by his contract, by exception, &c. tho' a tenant is not so bound, by covenant in law. But where the use of a thing is demised, and it runs to decay, so that the lessee or tenant cannot have the benefit of it; for this no action of covenant lieth for the lessee; and if the lease, &c. is not good, there can be no covenant, or any breach. *Lil. Abr.* 349. *Yelv.* 19. *2 Danv. Abr.* 233.

If a man makes a lease of lands for years, and then turns out the lessee, he shall have covenant against the lessor, tho' there be no exprefs covenant in the deed: but in case a stranger enters before such lessee, the lessee shall not have an action of covenant upon this ouster, because he was never a lessee in privity to have the action; yet a stranger to the deed may not take advantage of a covenant. *Yelv.* 18.

A covenant for the lessee to enjoy against all men, extends not to tortious acts and entries, &c. for which the lessee hath his proper remedy against the aggressors. If a person covenants in a deed, that he hath good right to grant, &c. and he hath no right, it is a breach of covenant, for which action of covenant lieth; and where a man by his own act disables himself to perform a covenant, it is a breach thereof; and no duty or cause of action arises upon any covenant, till it be broken. *Vaugh. 123. 5 Rep. 21. 2 Bulst. 12.*

On covenants in general, if the plaintiff have judgment in an action for one breach, and afterwards the covenantor breaks his covenant again, a new action may be brought, and so for every breach: or in covenants perpetually upon a new breach, a *scire facias* may be had on the former judgment, and the plaintiff need not bring any new writ of covenant. *Co. Rep. 154. Cro. El. 5.*

Action of detinue lies for recovery of goods or chattels, lent and delivered to a man to keep, or to deliver over to a third person, who refuses to re-deliver them, and detains them in his hands. It is used in these two cases:

1. For recovering goods detained.
2. For recovery of deeds and charters.

1. This action lies for any thing certain and valuable, wherein one may have a right or property; as for cattle, cloth, household-goods, plate, jewels, bags of money sealed, or chests of money lock'd, sacks of corn, loads of wood, &c. but for money out of a bag, or corn out of a sack, &c. detinue lies not, because they cannot be distinguished from another man's corn or
F money;

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money; and therefore the party must have an action on the case, &c. *F. N. B.* 138. *Co. Lit.* 236.

The thing detained must be once in the possession of the defendant; which is not to be altered by act of law, as seizure in execution, &c. and the nature of the thing must continue without alteration, to intitle this action; so that if leather be made into shoes, or timber be used in building, &c. the writ of detinue will not lie. In case of delivery of goods, if a person to whom a thing is delivered dieth, detinue may be brought against his executors, or against any person to whom the same comes; as if things be delivered to be kept, whether by the party, or his father, ancestor, &c. he may bring this action, if detained. *11 Rep.* 89. *4 Rep.* 83.

If one lends me a horse, or such like thing, he must have the very thing restored, &c. or detinue lieth against me: tho' where goods, &c. are delivered by way of loan, as if one lend another money, corn, or the like, he cannot expect the same thing again; but the same in specie and quantity. Grantees of goods, and persons to whom they are to be delivered over, &c. shall have action of detinue: and if a man bargain and sell goods, upon condition to be void, on payment of money at a day; if he pays it, he may have detinue for the goods. *Cro. Lit.* 89. *Cro. Eliz.* 267. *Bulst.* 69.

A general action of detinue lies against one that finds a man's goods; though if I deliver any thing to a person, to re-deliver to me, and he loses it, if another finds the thing, and delivers it to one who has right to the same, he is not chargeable to me in detinue: but where
any

any goods are delivered to a man, and he delivers them to another, action of detinue may be had against the second person; and if he deliver the goods to a party having right thereto, yet 'tis said he is answerable. 9 H. 6. 58. 2 *Darv. Abr.* 511.

If a person receives goods of me for my use, I may take my goods again without request; or if they are left or delivered to deliver to another man, before they are delivered I may countermand the authority, and require the goods again; and may bring an action, or take the goods where I find them. *Co. Lit.* 498.

2. Action of detinue may be had for charters, which make the title of lands; and the heir shall have a detinue of charters or writings, altho' he hath not the lands: and in this action, judgment is given to deliver the deed found by verdict to be detained, or the value, &c. But if the issue be upon the detinue, and it is found that the defendant hath burnt or destroyed the charters, the judgment shall be for the plaintiff to recover the land in damages; and not the deeds, which it appears cannot be had. *F. N. B.* 308. 2 *Rob. Abr.* 101.

Where the charters relate to the freehold, detinue must be brought in the *Common Pleas*, and in no other court: and the defendant cannot wage law upon a detinue of writings concerning the inheritance of lands nor of any indenture of lease for years; but a defendant may wage his law in detinue in almost all cases touching goods or chattels; to prevent which trover may be brought, when the conversion changes the detinue to action of the case, and he cannot wage his law. *Co. Lit.* 286.

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The freedom of this *action of trover* from wager of law, and the less degree of certainty requisite in describing the goods, (*Salk.* 654.) gave it so considerable an advantage over the action of *detinue*, that BY A FICTION OF LAW actions of trover were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold or used them without the consent of the owner, or refused to deliver them when demanded. THE INJURY LIES IN THE CONVERSION, for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown: therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner; for which reason such refusal is, *prima facie*, sufficient evidence of a conversion. 10 *Rep.* 56. The fact of the finding, or *trover*, is therefore now totally immaterial: for the plaintiff need only to suggest (*as words of form*) that he lost such goods, and that defendant found them; and if he proves that the goods are *his* property, and that the defendant had them in his possession, it is sufficient. BUT A CONVERSION MUST BE FULLY PROVED: and then in this action the plaintiff recovers damages, equal to the value of the thing converted, but not the thing *itself*; which nothing will recover but an action of *detinue* or *replevin*.

Proceedings in actions of trover, are not to be stayed, upon bringing the goods into court. *Say. Rep.* 120.

It is equally a conversion to sell the goods of A. which were delivered to the seller, by a per-

son not having authority to deliver them as it is to take the goods of *A.* and sell them. *Say.*

Rep. 41.

So it is in *A.* to sell the goods of *B.* for the benefit of *C.* as it would have been, in case *A.* had sold the goods for his own benefit. *Say.*

Rep. 41.

Release the only matter that can be pleaded specially in this action. *Say. Rep.* 16. *Lossi's Rep.* 323.

Does not lie for or against an executor or administrator, for conversion by testator or intestate. *Cowp. Rep.* 371.

It is in form a fiction, in substance founded on property. *Cowp. Rep.* 374. *1 Burr. Rep.* 31.

It is a remedy to recover the value of personal chattels, wrongfully converted by another to his own use. *1 Burr. Rep.* 31.

Trover lies, where the goods were taken wrongfully and by trespass. *1 Burr. Rep.* 31.

Plaintiff in this action, waives the trespass, and admits the possession to be lawful. *1 Burr. Rep.* 31.

It may be brought for an unlawful converting, tho' original possession was lawfully obtained. *1 Burr. Rep.* 31.

No damages can be recovered in this action, for the mere taking. *1 Burr. Rep.* 31.

Possession in the plaintiff, and a wrongful conversion by the defendant, are the two only things necessary for the plaintiff to prove, in order to recover in this action of trover. *1 Burr. Rep.* 31.

It is maintainable by the assignees against a sheriff, who sells the goods of a bankrupt, before taken by him in execution, after assignment. *1 Burr. Rep.* 31.

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There can be no set-off in trover. 4 Burr. Rep. 2477.

This action of trover must be founded in property. 4 Burr. Rep. 2481.

Trover lies against a custom-house officer, for seising and carrying to king's warehouse, goods not seisable. 5 Burr. Rep. 2659. 1 Wils. Rep. 146.

Injurious conversion, gift of action of trover. 5 Burr. Rep. 2826.

In trover, if value of thing be uncertain, or plaintiff insists on going on, to recover special damages, court will not stay proceedings, on delivering up things sued for, with costs. 2 Bl. Rep. 902.

Trover lies for a dog which was lost, and which defendant refused to deliver, unless paid for keeping same. 2 Bl. Rep. 1117.

Special bail required in trover. 1 Wils. Rep. 23. See 335.

In trover, evidence may be given to shew real time of suing out writ, so as to avoid the relation to the first day of term. 1 Bl. Rep. 320. Judgment for defendant in trover, not pleadable in bar of action on the case, for value of the same goods, unless same question in both. 2 Bl. Rep. 779. 3 Wils. 240, 241.

Trover and case may be joined. 2 Bl. Rep. 848. 3 Wils. Rep. 349.

In what cases the specific thing demanded, may be brought into court, or delivered to the plaintiff; and in what cases it may not. 4 Burr. Rep. 1364.

As to the *action of slander*, it is necessary to observe that, words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are

are held to be more heinous, than words spoken of a common person; (1 *Vent.* 70.) and, tho' they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury: which is redressed by an action on the case founded on many ancient statutes, (*Westm.* 1. 3 *Ed.* 1. c. 34. 2 *Ric.* 11. c. 5. 12 *Ric.* 11. c. 11.) as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party to recover damages for the injury sustained. Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man. Lord *Raym.* 1369. It is said, that formerly no actions were brought for words, unless the slander was such, as (if true) would endanger the life of the object of it. 2 *Vent.* 28. But too great encouragement being given by this lenity to false and malicious slanders, it is now held, that for scandalous words, which may endanger a man in law, may exclude him from society, may impair his trade, or may affect a peer, a magistrate, or one in public trust, an action on the case may be had WITHOUT PROVING ANY PARTICULAR DAMAGE to have happened, but merely on the probability that it MIGHT happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring any

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action against me, unless he can shew some *special loss* by it; in which case he may bring his action against me, for saying he was a bastard, *per quod*, he lost the presentation to such a living. 4 Rep. 17. 1 Lev. 248. But mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with any injurious effects, will not support an action. So scandals, which concern matters merely spiritual, as to call a man heretic, or adulterer, are cognizable only in the ecclesiastical court; unless any temporal damage ensues, which may be a foundation for a *per quod*. Noy 64. 1 Freem. 277. Words of heat and passion, as to call a man rogue, knave, nor rascal or villain, if productive of no ill consequence, nor of any of the dangerous species before mentioned, unless the words be applied by saying villain to such a man, or knave in such an affair, &c. are not actionable. 10 Raym. 61. Danv. Abr. 114. Hob. 93. 1 Rep. 184. Neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill will: for, in both these cases, they are not *maliciously* spoken, which is part of the definition of slander. (Finch. L. 186. 1 Lev. 82. Cro. Jac. 91.) The manner of laying the slander or defamation in a declaration for words being, that defendant *falsely and MALICIOUSLY, said, rehearsed, proclaimed and loudly published* the words, &c.

Action of slander lieth for defaming a person in his reputation; being no more than an action on the case for words, &c. And when words spoken affect a man's life, or liberty, office, trade,

trade, or tend to loss or preferment in marriage, service, &c. or to his disinherittance, or which occasion any particular damage, this action may be brought. There are several divisions of actions of slander as follow:

1. For charging a man with particular crimes.
2. Slander of persons in their offices and professions.
3. Slandering a man's title to an estate, &c.
4. Of defamation by libels.

1. Where any words are maliciously spoken of another, for which, if true, they would touch his life, or he might be punished, action of slander lies; as to call a man traitor, robber, felon, &c. or charge him with the committing any of these crimes; or to say of one, if he might have his will, he would do such a thing, which thing is actionable. 10 Rep. 130. *Dyer* 19.

To reproach a person with a heinous crime, as that he lay in wait to rob or murder any one; to charge a man with a rape, that he did ravish or was guilty of ravishing a certain woman; or say he should have been hanged for a rape, &c. and charging one with sodomy or buggery, &c. being very penal by the law, for these action lieth. The charging a person with stealing things, or as a receiver of stolen goods, are actionable; tho' the words must import a certain charge of felony, and not be of cutting and taking away standing corn, apples from trees, &c. This action of slander may be had for calling a person thief;

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thief; unless something of qualification be coupled to prove the thing no felony: and for conspiring to indict a man falsely and maliciously of felony, or other offence, on his acquittal, &c. but not if it appears on the trial there was probable cause for the indictment. *Rep.* 589. *Bulst.* 112.

For saying of another, that he hath killed, or concealed the murder of such a man, action lies; but the defendant may shew that the party is or was alive at the speaking of the words, and then no action will lie thereon. For saying one is a pirate, or maintainer of pirates, action of slander lieth; and so it is to say of a man, that he did burn a dwelling house, or a barn with corn, &c. *Dy.* 236. *Brownl.* 15. 2 *Bulst.* 134. *Yelv.* 154.

Such words as charge a person with forgery of false deeds, or with perjury, bribery, extortion, maintenance, &c. all which are punishable by the common and statute laws, and affect a man's liberty and estate; for these words an action of slander may be brought. If one say of a person, that he could prove him perjured in a court of record; or call him perjured knave, action lies; so where a man says he gave another money for forswearing himself; and when the words charge the party with subornation of perjury. *Brownl.* 18. 3 *Inst.* 163. *Danv. Abr.* 87.

2. To say of a member of parliament, or a bishop, &c. that he is a papist, is actionable: and for saying a parson preaches lies in the pulpit, action of slander lieth; not if words are, he is a preacher of false doctrine. If one call a justice of peace false justice, &c. A doctor of physick fool, ass, empirick and mountebank; or

or say that a counsellor is no lawyer; call an attorney rogue and knave in his profession; or to say of him that he is not fit to be an attorney; or that he is no more a lawyer, than the devil, and calling a clerk in court a corrupt man, &c. in these cases action lies. 2 *Brownl.* 166. *Danv. Abr.* 119, 113. 4 *Rep.* 15. 3 *Wils.* 59.

Charging a member of parliament with want of sincerity and breaking his word, not actionable. 2 *Bl. Rep.* 750. 3 *Wils. Rep.* 177, 178.

An action of slander will lie for words spoke against a sheriff, receiver, steward of a court, mayor, constable, &c. but the words spoken must relate to the office, and the person be an officer at that time. For saying of a merchant or tradesman, that he is a beggarly fellow, and not able to pay his debts; or to call him bankrupt, or say he will be a bankrupt shortly; and saying of any other that he is a runaway, and dares not shew his face: that a man is a cheating knave in his trade; or that he keeps a false book in his shop, &c. whereby he is injured, action lies. 10 *Rep.* 61. *Danv. Abr.* 114. *Hob.* 93. *T. Raym.* 184.

If one say, that an alehouse-keeper keeps a bawdy-house, action lieth; but to say an inn-keeper harbours rogues, &c. is not actionable, for his house is common to all guests. For calling a man whore-master, or a woman whore, except in *London* by the custom of the city, no action lieth: tho' to say of a man that he is a common whore-master, and lay with a certain woman, and is a drunken fellow, &c. Or that a woman hath a bastard, or is with child, and lay with such a man, &c. whereby either of them lose their marriage, are actionable; but not without

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without special damage on action at common law. *Cro. Eliz.* 582. *2 Roll. Rep.* 136. *4 Rep.* 16. *2 Salk.* 696. *2 Ld. Raym.* 959.

Where a man is courting a woman, if another say of him, that he hath the *French* disease, &c. or for saying of a person, he hath the pox, leprosy, &c. by reason of which he ought by law to be separated from society, action of slander lies: but 'tis otherwise if the words are that he had the pox, after cured. The saying of one who stands for a place, that he is an ignorant man, and not qualified; or of a parson, that he is an excommunicate, &c. if thereby he loseth his preferment, and the servant his service, 'tis actionable. *Cro. Jac.* 430. *Danv. Abr.* 87, 103. *Lev.* 248.

3. Slandering the title of another person is actionable; as to say he has no right to such a house or lands, or that he hath no good estate therein; &c. when he is about to sell or let the same, and by this slander the chapman falls off. And for calling a man bastard, that is heir to an estate action lieth; tho' he be not about to sell it, and he have no particular loss by speaking the words, for thereby the title of the land may be drawn in question: but 'tis said, if he be an heir apparent, the action lies not till he is disinherited or prejudiced by it; and if he who spoke the words claim the estate as next heir, the action will not lie, which may be set forth by way of bar. *Co. Rep.* 77. *4 Rep.* 18. *Danv. Abr.* 83.

To maintain such an action, there must be express or implied malice; and the words spoken must go to defeat the plaintiff's title, if they are spoken to protect a person's own property, and prevent others from being cheated,

ed, the speaker is excusable; nor is an attorney delivering such person's message, liable to action. 4 Burr. Rep. 2425, 2426.

As to slander of persons, tho' scandalous words are spoken before a man's face, or behind his back, by way of affirmation or report, in jest or earnest, when sober or drunk, &c. they are actionable; and so it is if the words are spoke directly or indirectly, or obliquely; and tho' they are pronounced in any language, if understood: but where they can have a double interpretation, they shall be taken in the mildest sense, that no action shall lie. 4 Rep. 14. Hob. 236. Cro. Jac. 438.

If one say that another said a third person did a certain scandalous thing, such third person may have his action of slander against the first man, with an averment that the second never said so, whereby the first is the author of the scandal. In case the slander proceeds from a man's wife, the husband and wife, must be sued for it, and not she alone: and for any scandal against the wife, he and she are to bring the action; but for words against both a man and his wife, the husband may prosecute one action for his slander, and he and the wife may afterwards sue another action for hers. Cro. Jac. 406. Styles, 113, 161.

When the words are utterly uncertain, no *innuendo* or averment can make them good; and to these actions the defendant may plead the general issue, Not guilty; or if the plaintiff declares on some of the words only, when all together they are not actionable, he may set them forth at large as he spoke them, and traverse or justify the whole, &c. Also if the defendant can make proof of the words, he may plead
special

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special justification; but if the plea be not made good, damages will be aggravated. *Styles* 70. *T. Raym.* 61. *Co. Ent.* 26.

If some of the actionable words laid in the declaration, are proved, plaintiff shall have a verdict. *Bl. Rep.* 790.

4. Defamation by libel, as by scandalous writing, &c. is likewise actionable; and printing or writing may be libellous, if the scandal is not charged in direct terms, but ironically, or tho' there be only the first and last letter of the name, if the jury will find it to point at a particular person; and the person who is the author or contriver, and the procurer, and publisher of a libel, knowing it to be such, are all punishable; as are booksellers, &c. who sell libels, although they know not the contents thereof. *5 Rep.* 125. *Moor* 862. *5 Mod.* 167.

And a libeller shall be punished, though the party of whom the words be spoken is dead; and notwithstanding the matter of the libel is true, for it is not material whether it be true or false, if the prosecution be by way of indictment or information; but in an action of the case, one may justify that it is true. *Hob.* 253. *Hardr.* 470.

Information refused, as for a libel, against a printer, who had published an advertisement concerning a married woman, by her husband's order. *Say. Rep.* 122.

Such informations refused, for matter contained in an affidavit, exhibited in *Chancery*. *Say. Rep.* 112.

The gist of every charge of every libel, consists in the person or matter, of or concerning whom

whom or which the words are averred to be spoken or written. *Cowp. Rep.* 679.

All circumstances necessary to constitute the crime, must be set forth. *Cowp. Rep.* 683.

Where writing is so clear as to amount of itself to a libel, foreign matter unnecessary. *Cowp. Rep.* 683.

When libel does not in itself contain the crime without extrinsic aid, same must be averred on record; by averments, if new matter by way of introduction, if explanatory only by way of innuendo. *Cowp. Rep.* 682, 684, to 689.

A general rule, that party libelled must deny charge on oath, in order to obtain information for private libel, charging specific offence. *Dougl. Rep.* 284.

Publisher's ignorance of contents of libel, no justification. *Loff's Rep.* 762, 763.

Impotence of libel, no excuse. *Loff's Rep.* 778.

Misdating facts, or omission of letters, in words, will not make writing less a libel. *Loff's Rep.* 778. See *Id.* 780.

Action on the case for libellous words, spoken or sworn in a court of justice, in a man's own defence against a charge upon him in the court, will not lie. *2 Bur. Rep.* 810.

Bail for publishing a blasphemous libel, shall be both for appearance and good behaviour. *1 Wils. Rep.* 29.

Venue in an action for a libel cannot be changed. *Durnf. and East's Rep.* 571.

Letter that party stunk of brimstone, and had the itch, libellous. *2 Wils. Rep.* 403.

Publication may be justified or excused. *5 Bur. Rep.* 2666.

Expulsion

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Expulsion from a quakers meeting, and assigning the reason in their books, no libel. 1 *Bl. Rep.* 386. 2 *Burn's Eccles. Law.* 189.

Action of assault and battery is an action for a trespass against a man's person, where any injury is done to another in a violent manner; as by striking or beating of a man, pushing, jolting, filling upon the nose, &c. and as an indictment for this offence for a breach of the peace, the party shall be fined; so in an action he shall render damages. *Dalt.* 282.

If a man in anger lift up or stretch forth his arm, and offer to strike or menace another; or hold up any weapon to strike at him, being within his reach; or shall thrust or push a person, cast a stone at him, tho' he be not struck therewith; throw wine in another's face, or upon his clothes, &c. These are trespasses and assaults in law, for which action lies: and if one threaten to beat or do me some bodily mischief, or lieth in wait to do it; if I dare not follow my business as at other times, and I have any loss thereby, I may have this action. *Bro. Tresp.* 236. *Finch* 29. 18 *Ed.* 4. 28.

To hold a person by the arm is an assault, if not battery; and to strike one, altho' he is not hurt with the blow, and striking at him, if he be neither hit nor hurt, have been held an assault: for it does not always imply a hitting or blow, because in trespass for assault and battery, a defendant may be found guilty of the assault, and excused of the battery. But if any one strike at another, at a great distance; or if it be near, or he throw stones at him, &c. merrily or accidentally, and not purposely, no action will lie. 22 *Aff.* 60. *Finch* 40.

It is said the least touching of another in anger is a battery; and tho' battery may not be committed by attempting to beat, but generally a stroke must be actually given; yet if one comes to the assistance of another who is beating a third person, tho' he do not touch him, he is guilty of battery; and he who commands or procures a battery to be done, may be charged as a principal in this action. And spitting in a man's face, &c. is battery, if not done by accident. *Hob. 176. Co. Lit. 57. 6 Mod. 149, 172.*

If two or more persons meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery: though if any of them use violence to force his way in a rude manner, or any struggle is made about the passage to that degree as to do hurt; it will be a battery, for which action of assault and battery lieth. *6 Mod. 149.*

To lay hands gently on another, not in anger, is no battery to found an action; the law will not presume any damage: and in this case the defendant may justify *molliter manus imposuit*. Also a man may justify an assault, in defence of his person or goods; or of his wife, father, mother, master, &c. and for the maintenance of justice: and when a person is beaten by another, he may return it, and plead that the other's battery was occasioned by his own assault. *Cro. Eliz. 770. Kel. 64. 2 Inst. 316.*

A man and his wife may have this action together, for any the least beating of the wife; in case it be such a battery, as thereby loses her company or service, he alone may bring it:

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and actions for loss and injury done to the husband, in depriving him of the conversation and service of his wife, are generally laid for assaulting and detaining the wife, &c. whereupon large damages are given. 3 Rep. 113. 10 Rep. 130. Cro. Jac. 538.

For the assault and battery of a man's wife, child or servant, the husband, father and master shall have action of trespass: but a husband himself may by law moderately correct his wife; a master his servant or apprentice, a school-master his scholar, &c. and it will not be battery. 2 Rol. Abr. 546.

Where any man is assaulted or beaten, and he hath no witnesses to prove the same, the party instead of this action may bring an information in the crown-office.

Declaration that defendant on 6th May, and on divers other days and times, between that day and the commencement of the suit, assaulted plaintiff, is bad. Cowp. Rep. 828.

Action of trespass lies generally for any wrong or damage, which is done with force and arms by one private man to another; sometimes against the person of a man, and sometimes against his goods and lands, &c. And I shall here divide this action into,

1. Trespass to a man's lands or goods.
2. Where divers actions are brought and trespasses continued.
3. Action of trespass by statute.

1. In all trespasses, there ought to be a voluntary act, and a damage: and action of trespass lieth where a man makes an entry on the lands of another, and does damage; and trespass

vi & armis may be brought by him that hath the possession of goods, or of a house, if he be disturbed in his possession. 2 *Rol. Abr.* 572.

Trespases actionable are done with pretence of title, by which the property is altered, or without pretence of title; and they are local, that is, annexed to a place, as breaking the close of another, &c. or transitory, as the carrying away a person's goods, &c. A person that hath but a bare possession of a house or land, may maintain trespass against him who has no right; and he who has but the herbage, may have it for a wrong done him in the grass or ground. *Finch* 303, 198. *Plowd.* 144.

Entering into a house against the will of the owner, is trespass for which action lies; but a man may lawfully come into the house of another, to demand or pay money, &c. for breaking of a man's close and ground; or driving a cart and horses over the land of another person, where there is no lawful way for it; for chasing of cattle, by which means they die or are damaged; the taking away pales, and breaking the doors, windows, &c. of a house, or fences of land; for eating corn of another with cattle; fishing in another man's pond, and breaking the pond; for digging in a person's coal-mines, and carrying away coals; plucking up garden herbs and roots; tearing of a bond or other writing, &c. in all these cases, all persons, that do any such wrongs, may be sued in action of trespass. *Co. Lit.* 57. *Cro. Jac.* 463. *Saund.* 220.

Executors may have this action for the testator's goods, taken out of their possession; also administrators for goods of intestates: and

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churchwardens may bring trespass for the parish goods, belonging to the church, &c. But in common actions of trespass for taking of goods, the plaintiff must alledge a property in himself; for there may be two intendments; one that they were the defendant's own goods, and then the taking is lawful; and the other, that they were the goods of the plaintiff, when the taking will be wrongful; tho' wherever it is indifferent in construction, it shall be taken most strongly against the plaintiff in the action. *F. N. B.* 92, 117. *Bro. Tres.* 389. 2 *Lev.* 20.

In trespass against three persons, one of them commits battery, another imprisonment, and the third takes the goods, &c. all at one time; all are guilty of the whole, and action lies against them, so where many come to do a trespass, and they are all present when done, altho' some of them only look on; if they do not declare their dissent thereto. *Co. Lit.* 57. 10 *Rep.* 66. 3 *Lev.* 324.

This action lies for making an excessive distress, in case defendant had no right to distress. *Say. Rep.* 684.

Defendant in this action cannot justify throwing down ladder, upon which a person is, altho' ladder be unlawfully placed upon his land. *Say. Rep.* 139.

Trespass does not lie against a pound-keeper merely for receiving cattle, though taking tortious, unless he goes beyond his duty, and assents to the trespass. *Cowp. Rep.* 476.

Trespass *vi et armis*, and trespass on the case, cannot be joined in the same action. 2 *Burr. Rep.* 1114. their distinction. 3 *Burr. Rep.* 1556.

Where-

Wherever there is an exclusive right, trespass *vi et armis* will lie. 3 Burr. Rep. 1827.

Merely accidental involuntary trespass may be justified, a voluntary one cannot. 4 Burr. Rep. 2093, 2094.

In trespass for taking goods, declaration must specify particulars. 4 Burr. Rep. 2456.

Trespass and assault will lie for having originally thrown a squib, which, after having been taken up, and thrown about in self defence by two other persons, at last hit defendant, and put out his eye. 2 Bl. Rep. 892. 3 Wils. Rep. 403.

In trespass *quare clausum fregit*, plaintiff may declare generally, without naming the closes, which draws on the common bar, and new assignment. 3 Bl. Rep. 1089.

Trespass lies for working an estray, tho' the original taking admitted to be lawful. Durnf. and East's Rep. 12.

May justify trespass in following a fox with hounds over the grounds of another. Durnf. and East's Rep. 334.

In trespass complaint is made of an immoderate wrong. 2 Wils. Rep. 313.

Trespass lies for owner of soil, against one for placing a stall in a market, without his leave. 1 Wils. Rep. 107.

Trespass for getting plaintiff's daughter with child, *per quod servitium amisit*, will lie, altho' thirty years of age. 3 Wils. Rep. 18.

This action will not, even for a parent, if the child was not actually in his service. 2 Burr. Rep. 1179.

What shall be considered in trespass as matter of aggravation only. 3 Wils. Rep. 22, 294.

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Trespafs *vi et armis* lies against sheriff for taking the goods of *A.* instead of those of *B.* in execution. 3 *Wils. Rep.* 309. 2 *Bl. Rep.* 832.

Trespafs lies against excise officer, for entering house under warrant of the commissioners, obtained upon defendant's own information, that he *suspected* teas were concealed therein, but found none. 3 *Wils. Rep.* 344. 2 *Bl. Rep.* 846.

2. If several actions of trespafs be brought for the same cause, and they are brought to vex the defendant, he may get them joined into one; but then the trespafses must not be of several natures, which may not be tried in one action: and a man may have action of trespafs for divers trespafses; or for a trespafs done in several places, if they are in the same county; for otherwise they cannot receive one trial, they being local causes of action triable in the county where done. 2 *Lil. Abr.* 596.

Action of trespafs *vi et armis* lies not but in a court of record; and in this action, perfect notice must be taken of the day when the trespafs was committed, whether there were not several trespafses at several times, and the place where done, with the damages sustained: trespafses continued may be laid with a *continuando* divers days, &c. but things must lie in continuance; and it is best to set forth that the defendant, between such a day and such a day, cut several trees, &c. (and not from such a time to such a time) when evidence may be given of cutting on any day within those days. 2 *Salk.* 638. 2 *Ld. Raym.* 974.

3. As to trespafses by statute, persons maliciously maiming, wounding, or hurting any cattle;

ele; destroying any plantation of trees, or throwing down inclosures, shall forfeit treble damages, in action of trespass: tho' if the jury give not 40s. damage in trespass, the plaintiff shall have no more costs than damages; unless the title come in question, or something of the plaintiff's be carried away, or the battery be well proved, &c. 23 Car. 2. c. 7, 9. If in trespass defendants are acquitted, they shall have costs; except the judge certify cause for making them defendants, by 8 & 9 W. 3. c. 11.

○ If the defendant in trespass, disclaims any title to the land, and the trespass is involuntary or by negligence, he may plead a disclaimer, and tender of amends before the action brought, &c. 21 Jac. c. 16. And where a person justifies for a trespass, he must confess it, and shall not be excused, but upon an inevitable necessity. 2 Salk. 644.

There is nothing in the original work, or in any of the subsequent editions, touching the action of false imprisonment, and as that subject is very fully and learnedly discussed by the commentator of the (1) Laws of England, I shall only add here such determinations as have been made on the subject, since Sir William's last edition; because it is to be presumed, that very few readers on the law, are not in possession of that most valuable publication.

Trespass *vi et armis* and false imprisonment lies, as well against an attorney, as his client,

(1) 3 Black. Com. 127.

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for the imprisonment of the defendant, at the suit of the latter, by virtue of a *ca. sa.* sued out by the former. 3 *Wils. Rep.* 368. 2 *Bl. Rep.* 866.

This action lies in *England*, by a native of *Minorca*, against the governor of that island, for an injury of that nature, committed in *Minorca*. *Cowp. Rep.* 161.

This action is maintainable for arresting the defendant on a void or irregular process. 3 *Wils. Rep.* 341. 2 *Bl. Rep.* 845.

It is not necessary in this action, in order to justify the imprisonment under *capius* of inferior court, to set out all the proceedings of that court, or to shew, that the cause of action in inferior court, arose within the jurisdiction of that court. *Say. Rep.* 82, 83.

On an action of false imprisonment, where defendant justifies the commitment, as a magistrate, for a bailable offence, in consequence of an information upon oath, plaintiff under general replication, *de injuriâ sua propriâ, &c.* cannot give in evidence, a tender and refusal of bail, but ought to have replied it specially. 2 *Bl. Rep.* 1165.

This action does not lie for a person arrested by legal process, at a time when privileged *redeundo* from attending the court. 2 *Bl. Rep.* 1190.

Trespass *vi et armis* for imprisonment, does not lie against a serjeant at mace, for refusing to accept bail on arrest. 3 *Wils. Rep.* 343.

An action will not lie at common law, for false imprisonment, where the imprisonment merely in consequence of taking a ship *as prize*, altho' the ship be acquitted. *Dougl. Rep.* 594.

A writ

A writ of *ejectione firmæ*, or action of trespass in *ejectment*, lieth, where lands or tenements are let for a term of years: and afterwards the lessor, reversioner, remainder-man, or any stranger doth eject or oust the lessee of his term. *F. N. B.* 220. In this case he shall have this writ of *ejection*, to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages.

Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not therefore be improper to delineate, with some degree of minuteness, it's history, the manner of it's process, and the principles whereon it is grounded.

The writ of covenant, for breach of the contract contained in the lease for years, was antiently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior (*F. N. B.* 145.) to that of the lessor, or by a grantee of the reversion, (who might at any time by a common recovery have destroyed the term,) tho' the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector

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ejector but in damages, by a writ of *ejectione firmæ*, for the trespass committed in ejecting him from his farm. *Fitz. Abr. tit. Eject. firm. 2.* But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy *not warranted* by the original writ *nor prayed* by the declaration (which go only for damages merely, and are silent as to any restitution,) *viz.* a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward IV. * tho' it hath been said (*P. N. B. 220.*) to have first begun under Henry VII. because it probably was *then first* applied to it's present principal use, that of trying the title to the land.

The better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is in it's original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, who may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *MAINTENANCE*, to convey a title to another, when the grantor is not in possession of the land: and indeed it

Edw. IV. 6. Per Fairfax; si homo per ejectione firmæ, le plaigniff recouvre son terme qui est arere, s'il bien come in quare ejecit infra terminum; et, si nul soit arere, donques tout in damages. (Bro. Abr. tit. quare ejecit infra terminum, 6.)

was

was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. 1 *Cb. Rep. Append.* 39.—When therefore a person, who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a **FORMAL** entry on the premises; and being so in possession of the soil, he there, *upon the land*, seals and delivers a lease for years to some third person or lessee; and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident, or by *agreement before-hand*) comes on the land, and turns him out, or ejects him.

For this injury the lessee is intitled to his action of ejectment against the tenant, or this *casual ejector*, which ever it was who ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; *viz.* **TITLE, LEASE, ENTRY, and OUSTER.** First, he must shew a good *title* in

in his lessor, which brings the matter of right entirely before the court; then that the lessor, being seised by virtue of such title, did make him the *lease* for the present term; thirdly, that he the lessee or plaintiff, did *enter* or take possession in consequence of such lease; and then lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a *writ of possession*, which the sheriff is to execute, by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and accidentally before the court, in order to shew the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the *lease*, *entry*, and *ouster*, a new and more easy method of trying titles by writ of ejectment, *where there is any actual tenant or occupier of the premises in dispute*, was invented somewhat more than a century ago, by the lord chief justice Rolle, who then sat in the court of upper bench; so called during the exile of king Charles the second. This new method intirely DEPENDS ON A STRING OF LEGAL FICTIONS; no actual lease is made, no actual entry by plaintiff, no actual ouster by defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, a lease for a term of years is to be made
by

by him who claims title, to the plaintiff who brings the action; as by *T. B.* to *A. B.*; which plaintiff ought to be some real person, and not merely an ideal fictitious one, who has no existence, as is frequently tho' unwarrantably practised: 6 *Mod.* 309. It is also to be stated that *A. B.* the lessee, entered; and that defendant *C. D.* who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, *C. D.* the casual ejector sends a written notice to the tenant in possession of the lands, as *E. E.* informing him of the action brought by *A. B.* and transmitting him a copy of the declaration.—On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of *C. D.* he is supposed to have no right at all; and, on judgment being had against *C. D.* the casual ejector, *E. E.* the real tenant will be turned out of possession by the sheriff.

But if the tenant in possession applies to be made a defendant, it is allowed him on this condition; that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; viz. the LEASE, of *T. B.* the lessor, the ENTRY of *A. B.* the plaintiff, and his OUSTER by *E. E.* himself, now made the defendant instead of *C. D.* which requisites, as they are wholly fictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease*, *entry*, and *ouster*, the trial will now stand on the merits of the *title* only. This done, the declaration is altered by inserting
the

Of Actions and Remedies.

the name of *E. E.* instead of *C. D.* and the cause goes down to trial under the name of *A. B.* (the plaintiff) on the demise of *T. B.* (the lessor) against *E. E.* the new defendant. And therein the lessor of the plaintiff (*T. B.*) is bound to make out a *clear title*, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for *A. B.* the nominal plaintiff, who by this trial has proved the right of *T. B.* his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by 11 *Geo. 2. c. 19.* on pain of forfeiting three years rent, to give notice to their landlords, when served with any declaration in ejectment: and any landlord may by leave of the court be made a co-defendant to the action; which indeed *he had a right to demand*, long before the provision of this statute. 7 *Mod. 70. Salk. 257.* In like manner as (previous to the statute of *West. 2. c. 3.*) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had *a right* to come in and defend the possession; lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. *Bract. l. 5. c. 10. § 14.*

But if the new defendant fails to appear at the trial, and to confess lease, entry, and ouster, the plaintiff *A. B.* must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector *C. D.*: for the condition on which *E. E.* was admitted a defendant is broken,

and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out *E. E.* and delivered possession to *A. B.* The same process therefore as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken. But execution shall be stayed, if any landlord after the default of his tenant applies to be made a defendant, and enters into the usual rule, to confess lease, entry and ouster. 11 Geo. 2. c. 19.

The damages recovered in these actions, tho' formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate; amounting commonly to one shilling or some other trivial sum. In order therefore to complete the remedy when the possession has been long detained from him who has right, an action of trespass also lies, after a recovery in ejectment, *to recover the MESNE profits* (i. e. the profits arising between the time of ejecting the plaintiff, the costs and his recovery in ejectment) which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession; whether he be made party to the ejectment, or suffers judgment to go by default. 2 Burr. 668.

This action of ejectment is however rendered a very easy and expeditious remedy to landlords whose tenants are in arrear, by 4 Geo. 2. c. 28.

As

Of Ejections and Remedies.

As this action of trespass and ejectment is the common remedy, whereby to recover premises, held against the will of the landlord, in case the tenant hath no right to continue in possession, from there being no agreement between the parties for that purpose; for the mere punctual payment of rent, as is vulgarly understood, is by no means a legal reason for a tenant's holding over, after the expiration of his term; in order to obtain speedy and effectual justice against obstinate and insolvent tenants, we will discourse on the matters that seem most necessary to be known, under the following particulars, *viz.*

I. The declaration.

II. The judgment; and

III. The execution; and

1. The Declaration.

Ejectment (1) is an action of trespass brought by the (2) lessee of a term of years to recover (3) such (4) term, when he is ousted thereof, the origin, improvement, utility, ease, and expedition of this ingenious fiction is now generally used to recover the possession of

(1) Ejectment is a possessory remedy, and only competent, where plaintiff's lessor may enter. 1 Burr. Rep. 119.

(2) An attorney at law cannot be lessee. Dougl. Rep. 466. n.

(3) Recovery binds the right and interest of him, who has the inheritance, and makes a title in the plaintiff. By Holt, Ch. J. 1 Salk. Rep. 2, 8. 2 R. Raym. 806.

(4) Ejectment the only remedy for terms of years. By Holt, C. J. 1 Salk. 258. 2 R. Raym. 806.

lands,

lands, and supplies the place, and is adopted in lieu of many, nay almost all real (1) actions, for the trial of titles to the possession of lands.

The method of commencing the above action is by (2) *feigning* a lease, and a nominal (3) plaintiff, an ejector, or nominal defendant, and thereupon to draw a fictitious declaration against such feigned ejector, with notice or subscription at the bottom thereof, to the tenant or tenants in possession of the premises, intended to be recovered, for him, her, or them to (4) appear, and defend his, her, or their title to such premises, or else that the feigned ejector will suffer judgment to be signed against him by default, whereby the tenant or tenants in possession will be ejected of the premises, they respectively hold.

The court of *King's Bench*, considers the declaration as process, 1 *Str.* 567. and *Common Pleas*, as the first process, *Barnes* 173, 186. and *K. B.* punishes contemptuous words spoken of the declaration, on delivery, as a contempt of the court. 1 *Str.* Rep. 567.

Herein also of

1. Title.
2. Parties.
3. Demise.
4. Premises.
5. Notice or subscription thereto, and
6. The service.

(1) 3 *Burr.* Rep. 1292, 1300, &c.

(2) This action of ejectment, is an *invention* for the advancement of justice, and to oblige the parties to proceed to trial, on the merits. 2 *Burr.* Rep. 667.

(3) 1 *Salk.* Rep. 260. 2 *Burr.* Rep. 667. 2 *Str.* 899. S. P.

(4) 8 *Mod.* Rep. 118.

H

I. The

Of Actions and Remedies.

1. The Title.

The court of *Common Pleas* would make no rule for judgment, in that the declaration was intituled *Trinity Term 17*, instead of 16 and 17 *Geo. 2.* *Barnes 186.*

2. Parties.

Coparceners (1) may join; *per Holt*, Ch. J.

When corporation (2) is lessor of the plaintiff, they must give letter of attorney to enter, and seal a lease on the land, upon which lease, they must try their title, and then their attorney must proceed in the common method.

One tenant in common may maintain this action (3) against another.

Lessor (4) of plaintiff, and tenant in possession, the only true parties to this suit.

Nominal (5) plaintiff (6) and casual (7) ejector judicially considered, as fictitious form of an action, really brought by lessor of plaintiff against tenant in possession.

Commoner cannot (8) maintain this action.

(1) 1 R. Raym. 276.

(2) See 12 Mod. Rep. 113. 1 R. Raym. Rep. 136.

(3) 12 Mod. Rep. 657.

(4) 2 Burr. Rep. 667.

(5) 2 Burr. Rep. 667, 668.

(6) Every plaintiff in ejectment must shew a right of possession, as well as of property. 1 Burr. Rep. 119.

(7) Writ of error cannot be taken out in name of casual ejector. 2 Burr. Rep. 756. *Barnes 189.* 8 Mod. Rep. 118. S. P.

(8) *Stra. Rep. 54.*

3. Demise.

3. Demise.

Amendment may be made, even in the time of the (1) demise, in order to prevent the lessor of the plaintiff from being barred.

Term enlarged, the same being expired twelve years before the ejectment brought, on payment of costs, the cause (2) being at issue, a special jury struck, and the parties gone down to the assizes, before the mistake was discovered.

On demise of heir by descent, demise laid on the day of the decease of his ancestor (3), good.

Formerly (4) if the term expired, by reason of an injunction, court of *B. R.* refused to enlarge it, upon the injunction being dissolved, without (5) consent; and *Holt*, Ch. J. said they could not alter (6) records.

(1) 4 Burr. Rep. 2228, 2229.

(2) 2 Bl. Rep. 940. Caf. Temp. Hardwicke Ch. J. 165. S. P.

(3) 3 Will. Rep. 274.

(4) Amendments in ejectment, are now carried much further than formerly. 2 Burr. Rep. 1161. 4, 2448, 2449.

(5) 1 Vent. 361. 1 Show. Rep. 207. Barnes, 17, 186.

(6) 1 Salk. 257. 6 Mod. Rep. 130. S. P. without consent. 2 Stra. 1272.

4. Premises.

1. For what premises, ejectment may be brought.
2. For what they may not.

1. For what Premises Ejectment may be brought.

- | | |
|---|---|
| <p>A.
Acres, their number and certainty must always be expressed. <i>Lev. Rep.</i> 118.
<i>Salk.</i> 254. <i>Cr. Car.</i> 573.
<i>Alder Carr in Norfolk</i>, 2 <i>Stra.</i> Rep. 1063.</p> <p>B.
Beast gate. <i>Ander. Rep.</i> 1.
2 <i>Stra. Rep.</i> 1084.
Boilery of salt. 1 <i>Lev. Rep.</i> 114.
Burgage. <i>Hardr.</i> 173.</p> <p>C.
Castle Gates. 2 <i>Stra. Rep.</i> 1063.
Chamber in second story of such an house, 3 <i>Leon. Rep.</i> 210.
Church, by name of Messuage. <i>Salk.</i> 256.
Close, called D. containing three acres of land. <i>Cro. Jac.</i> 435.
Coal mine. <i>Cro. Jac.</i> 150.
Common appendant, or appurtenant. <i>Stra.</i> 54.</p> | <p>Common of pasture. <i>Stra.</i> 54.
College. <i>Cr. El.</i> 354.
F.
Twenty acres of furze and heath. <i>Cr. Car.</i> 179.
G.
Garden. <i>Lev. Rep.</i> 58.
H.
Heath See furze.
Herbage. <i>Hardr.</i> 401.
Highway. 1 <i>Burr. Rep.</i> 143.
House. <i>Cr. Jac.</i> 654. or part of House. <i>Stra. Rep.</i> 695.
I.
One hundred acres of bogg, in Ireland. <i>Salk.</i> 255.
Mountain in Ireland. <i>Stra.</i> 71. 2, 1063. 4 <i>Mod. Rep.</i> 143.
L.
Land by the acres.
M.</p> |
|---|---|

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M.

Manor. *Litt. Rep.* 301.

Meadow.

Messuage. *Hardr.* 173.

Messuage, called "*The Black Swan*." 4 *Mod. Rep.* 136.

A mine. *Dougl. Rep.* 305.

O.

Orchard. *Cr. El.* 854.

P.

Pasture for 100 sheep. *Dalish*

95.

Pool. *Yelv. Rep.* 143.

Prebendal stall. *Wils. Rep.*

14.

Prima tonsura. *Cr. Car.* 262.

R.

Rectory. *Litch. 62.*

S.

Stable. *Cr. El.* 854.

T.

Tenement called "*The Black Swan*." 4 *Mod. Rep.* 136.

Tithes. 1 *Anders.* 107. *Cr.*

Car. 301. *R. Raym.* 789.

Vestry. 3 *Lev. Rep.* 96.

U.

Underwood. 2 *Rol. Rep.*

482.

W.

Whirlpool. *Co. Lit.* 5.

Wood. 2 *Rol. Rep.* 482.

2. For what Premises an Ejectment cannot be brought.

A.

Advowson. *Brownl. Rep.*

129. *Cr. Car.* 492. *Str.*

54.

C.

Close. *Godb.* 53.

Common for cause of vicinage. *Stra.* 54.

Croft. *Styl. Rep.* 30.

F.

Fishery. *Cr. Car.* 492. 8

Mod. 276.

H.

An House.

I.

Any incorporeal inheritance.

K.

Kitchen. *Noy Rep.* 109.

L.

Arable or pasture land, *Salk.*

Rep. 254.

So five closes of land, arable and pasture, called *Long*

H 3

Fur-

Furlongs, containing ten acres, not shewing how much of each. *Cr. Car.* 573.

M.

Meadows, fourth part of. *Lev. Rep.* 213.

Mountain, one hundred acres of, *Palm.* 100.

P.

Pannage. *Lev. Rep.* 213.
5 Mod. Rep. 332.

R.

Rent. *Cr. Car.* 202, 492.
Brownl. 129. *Stra.* 54.

River. *Yelv. Rep.* 143.

T.

Tenement. 11 *Stra. Rep.* 834.
3 *Wils. Rep.* 23. *Durnf. & East's Rep.* 2.

W.

Waste one hundred acres. *Palm.* 100.

Water, course of. *Yelv.* 143.

Y.

Yard land. *Cr. El.* 339.

5. Notice.

Notice at the bottom of the declaration, if the premises lie in *London* or *Middlesex*, must be to appear the *first* (1) day of the subsequent (2) term, to that of which the declaration is entituled; for if made to appear next term generally, the defendant will have that whole term to appear in. *Barnes*, 172.

If the premises in question, be in any other city or county, than *London* or *Middlesex*, the notice must be to appear the next term (3) generally.

The notice must be fair and honest, and (4) fairly and honestly interpreted to the tenant.

If notice is given to under-tenant, and he does (5) not acquaint his landlord therewith, but permits judgment to go against him, court, on motion, will not suffer execution to be taken out, till the right is (6) tried.

(1) Notice in ejectment to appear on *essoign* day of term, held ill, it should be to appear first day in full term, that being appearance day. 2 *Stra. Rep.* 1049. In country causes, where declarations are of *Trinity*, notice may be good to appear in next *Hilary*, (passing over *Michaelmas*;) tho' not the usual practice. *Barnes*, 186.

(2) 8 *Mod. Rep.* 118.

(3) Mr. Serjeant *Sayer*, seems to mislead the practitioner, in not making the above distinction. In the Common Pleas, there is no such distinction, according to *Lee*, Ch. J. *Say. Rep.* 49.

(4) By Earl *Mansfield*, Ch. J. *Lofft's Rep.* 53.

(5) Tenant receiving declaration, and not acquainting landlord thereof, so that he may defend the title, shall forfeit three years improved or rack rent of the premises he holds of such landlord. Stat. 11 Geo. 2. chap. 19. sect. 12. See *Barnes*, 193, 194.

(6) 12 *Mod. Rep.* 211.

6. Service.

Upon an attentive and considerate perusal of all the cases in the reports, it does not seem very clear, to me at least, whether the contents of the declaration, as well as those of the subscription or notice (1) thereto, ought to be read, at the time of service; this uncertainty in the matter, induced me to have recourse to the affidavit of service of the declaration, but even that was not satisfactory, for the precedents thereof do not appear at all uniform, however the following *dogmas* or rules, with their several exceptions, restrictions and limitations, seem now to be the settled and established practice of both the supreme common law courts, in *Westminster-Hall*.

1. That the contents of the declaration, as well as those of the notice of the casual ejector, to the tenant in possession, be so signified and explained by the party serving, to the party served, as to be fully understood by the latter; be the service on the tenant or any other person.

2. That the service be always on the premises in question, except only when the tenant is served personally, in which case it need not.

3. That by the practice of the court of *Common Pleas*, in every case of the service of

(1) The party who served wife of tenant in possession, in his absence, acquainted her with the contents of the copy of the declaration, and would have read the notice, but she said, she could read it herself, took the copy of the declaration from him, and run her eye over it, as if she read it; this held good service by the court of *Common Pleas*, 2 Bi. Rep. 800.

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the declaration, in the absence of the tenant, (the cases of serving his (1) father, his (2) daughter, or his (3) sister, together with the case of deserted premises, and these especially provided for, by the (4) act, always and only excepted) that there must be a tender of a copy of the declaration to, and a refusal thereof by the tenant, at the time of attempting to serve it, either proved or confessed; and that a bare acknowledgement by the tenant, of the receipt of the copy, will not be deemed sufficient (except before (5) excepted) but the practice (6) of the court of *King's Bench*, doth not seem to require any acknowledgement at all; that court being satisfied with a mere tender only.

4. That a true and examined copy of the declaration, on a treble (7) penny stamped sheet of paper, with a notice subscribed thereto, must be served on or before the effoign day of that (8) term, wherein the tenant in possession is required to appear, by the said subscription, otherwise the plaintiff cannot have judgment, till the subsequent term; and the reason is, because the declaration is the first (9) process; and the copy must not be served on a (10) *Sunday*, for the same reason; and though there

(1) Co. Cas. 115. Barnes's notes. C. P. 176.

(2) Barnes, 183.

(3) Rich. Reg. 167.

(4) Stat. 4 Geo. 2. chap. 28. sect. 2.

(5) Barnes, 171.

(6) Salk. 255.

(7) By stat. 5 W. & M. chap. 21. sect. 3. 9 & 10 W. 3. chap. 25. sect. 38. and 32 Geo. 2. chap. 35. sect. 1.

(8) 5 Com. Dig. 249. Barnes, 172, 173.

(9) Barnes, 173.

(10) Comb. Rep. 462. 8 Mod. Rep. 109. 12, 667.

is a book of some (1) authority, to the contrary, yet the law is so at this day.

That the reader may be a competent judge of the legal service of a declaration in ejectment, we shall consider the subject, under the following particulars. *viz.*

1. Service on the tenant, when he or she is in actual possession.
2. Service, in his or her accidental absence, and
3. Service, on his or her wilfully absconding from the premises in question.

1. Service on the tenant, when he or she is in actual possession.

Personal service on tenant in actual possession, is held the most legal, and such service may be any where, even off the premises in question (2); and where there are joint-tenants, they ought both to be served, at least, if they live in separate houses (3).

Leaving copy of declaration, at house of tenant in possession, where it had been tendered to his servants, and they refused to call their master, declaring they had orders to take no papers, held sufficient by court of *King's* (4) *Bench*.

(1) Comb. 286.

(2) Stra. Rep. 1064. Lofft's Rep. 301. Bul. Ni. Pri. 95. S. P. See 8 Mod. Rep. 118.

(3) Lofft's Rep. 301.

(4) 1 Stra. Rep. 575. See Cas. temp. Hardw. 164.

Eyre, Ch. J. said, declaration being tendered to tenant in possession, and refused by him, leaving same on the premises, in his presence, was a good (1) service thereof.

Signifying (2) to tenant in possession, who was both deaf and dumb, the meaning and contents of the declaration, and of the notice subscribed, by means of a person, who explained the same to her, by significant signs, which she understood; held a good service.

Court of *King's (3) Bench*, made a rule to shew cause, why a declaration served on a person who personated the tenant in possession, and accepted the same in the tenant's name, should not be deemed good service on the tenant herself; and that leaving copy of the rule at the tenant's house with some person there, or if no person there, then affixing same on the door, should be deemed good service.

2. Service in the tenant's accidental absence.

In case the tenant cannot be met with, from mere accidental absence, copy of declaration, may be left with his wife, and with (4) her only.

Service of declaration on the (5) father, the (6) daughter, the (7) sister, or on the

(1) Rich. Reg. 167. Co. Caf. 100. Barnes, 174, 185. S. P.

(2) Barnes, 168, 169.

(3) 2 Burr. Rep. 1181. See 6 Mod. Rep. 73. S. P.

(4) 5 Com. Dig. 249. 1 Burr. Rep. 615. and 2 Bl. Rep. 800. 8 Mod. Rep. 118.

(5) Co. Caf. 115. Barnes, 176.

(6) Barnes, 175, 183, 192.

(7) Rich. Reg. 167.

servant

(1) servant of the tenant in possession, will be service on them respectively, provided the declaration came to the notice of them respectively, or that they respectively acknowledged the receipt of it; but without such acknowledgement by them respectively, of their having respectively received such declaration, the service of the tenant in manner above stated, will not be deemed (2) sufficient.

Court of Common (3) Pleas, made a rule, that the tenant, a lunatic, and one *Major*, who transacted her business, and had the sole conduct thereof, and of her person, should not both shew cause why delivering copy of declaration to *Major*, the tenant not permitting party to have access to her, should not be good service of the tenant.

Court (4) of King's (5) Bench thought it necessary, when a lunatic was to be turned out of possession of his estate, to serve the committee, appointed and empowered under a commission, to take care of his estate.

Wife (6) of tenant in possession, on person knocking at the door of the house, in order to serve the declaration, opened a wicket in the door, and looked through it, but refusing to open the door, she was made acquainted with the contents of the declaration, and the Eng-

(1) 1 Salk. Rep. 256. Lofft's Rep. 401. It was said, that formerly, copy of the declaration could not be left with the tenant in possession's servant, according to the practice in B. R. 12 Mod. Rep. 313. but it might be in C. B. See Comb. 47.

(2) Bul. Ni. Pri. 95. Barnes, 175.

(3) Barnes, 190, 191.

(4) Mr. Justice Aston, in the absence of Earl Mansfield.

(5) Lofft's Rep. 401.

(6) Barnes, 171.

last subscription was read to her; and immediately after, and before declaration could be (1) tendered to her, she shut the wicket; whereupon the declaration was fixed upon the door; the service was insufficient, by the *Common (2) Pleas*.

Reading the subscription (3) aloud, so as the tenant in possession might hear it, after tendering the declaration to her, which she refused to accept, and leaving it on the floor, in the tenant's presence; and she retiring into the parlour, and shutting the door, held sufficient service by the court of *Common (4) Pleas*.

3. Service on tenant's wilfully absconding from the premises in question.

Service of ejectment on a servant of the tenant in possession, on his master's absconding, is not good service, to found the common rule upon, in the opinion of the court of *King's (5) Bench*; but the judges, upon the absconding of the master being duly verified to them upon oath, made a special rule, viz. that leaving the

(1) It not appearing that the copy was tendered to the wife, seems to have occasioned the division of the court, according to Barnes, 174, 178, 184.

(2) The court was divided so no rule was made; Chief Justice Eyre, and Denton, J. were of opinion, that it was not a good service, and Price and Fortescue, J. held the contrary. Co. Cas. 75. Ric. Reg. 164.

(3) The same court held such service not quite sufficient, as the notice ought to have been read *aloud*, though no person present. 2 Wils. Rep. 263.

(4) Barnes, 185.

(5) Cas. temp. Hardw. 164. 2 Burr. Rep. 1181, 1182. S. P.

decla-

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declaration with the servant should be good service of the master. But

The court of *Common* (1) *Pleas*, held, that such service on the servant, together with fixing a copy of the declaration on the street door, was sufficient.

Delivery of declaration to the maid servant of tenant in possession, he having no wife, and being absconded, and servant having given the same to her master, who said he would take care of it; upon these circumstances, the court of *King's* (2) *Bench* was of opinion, that the above was a legal service of the declaration.

Court of *Common* (3) *Pleas* made a rule, for tenant in possession, to shew cause, why, the service of the declaration, (he and his wife both absconding, so that neither of them could be served with a copy thereof,) by fixing up the same in the house, on the premises, in the presence of a woman servant left there, should not be deemed good service.

A like rule was made by the court of *King's* (4) *Bench*, upon tenant and his wife, both keeping out of the way, in order to prevent their being personally served, as to a *preceding* (5) service.

Rule to shew cause, why service of the servant of a tenant, a single woman, who absconded, and secreted herself in the messuage in question, and could not be personally served, at the

(1) Barnes, 173.

(2) 2 Barnard. B. R. 311.

(3) Barnes, 188.

(4) 2 Burr. Rep. 1116. marg. 1181. marg. 2 Bl. Rep. 290.

(5) 2 Burr. Rep. 1181. marg. 2 Bl. Rep. 290, 317. If the rule was not thus made, with a *retrospect*, plaintiff must lose the assizes. 2 Burr. Rep. 1181, marg.

house,

house, should not be good, granted by the court of *Common* (1) *Pleas*.

Rule of the court of *Common* (2) *Pleas*, that a tenant, who came into possession, surreptitiously, and absconded in order to avoid being served, should shew cause, why copy of declaration delivered to her son, servant, and manager of her affairs, and who lived in her family, should not be deemed good service; which rule, no cause being shewn, was made absolute.

Personal service, on the tenant's absconding, of his niece, she being the only manager of his house, and residing therein; and also fixing up another copy of the declaration, upon the premises, held sufficient by the court of *King's* (3) *Bench*.

II. Judgment.

Judgment cannot be signed against the casual ejector, until the afternoon of the fifth day after the end of the term, wherein the judgment was (4) moved.

Judgment is recovery of possession, without prejudice to right, *prout lex* (5) *postulat*.

No distinction between judgment by default, or upon (6) verdict.

Judgment concludes tenant, who cannot (7) controvert plaintiff's title or possession.

(1) Barnes, 188.

(2) Barnes, 190, 192.

(3) Say. Rep. 303.

(4) 1 Burr. Rep. 114. Cas. temp. Hardw. 160.

(5) 2 Burr. Rep. 667.

(6) 2 Burr. Rep. 667.

(7) 4 Burr. Rep. 1996, &c.

Regular judgment fairly obtained against (1) casual ejector, set aside, (the tenant having neglected to give notice to the landlord) and he made defendant upon terms.

If tenant in possession does not appear, then after the day appointed * by the court for his appearance, and to plead, judgment by default shall be entered against the casual ejector.

Till the reign of king Charles the second, it was doubted whether a *sci. (2) fa.* would lie on a judgment in ejectment; and before that time no *sci. fa.* had been brought.

He who hath the inheritance, or his heir in fee-simple, or any one who claims under him, except the issue in tail, may falsify recovery in the point tried, but even in that case only of a judgment by default. 1 *Salk. Rep.* 258. 2 *R. Raym.* 806.

To have judgment against casual ejector stand, all things must be very fair on the plaintiff's side, for the defendant loses his possession, by a fictitious proceeding. By the court of B. R. 7 *Mod. Rep.* 150.

The rule for judgment against the casual ejector is in the power of the court, on what terms they think fit. 1 *Salk.* 259.

If at trial, defendant will not appear, and confess lease, entry, and ouster, course is to call defendant and his attorney, if within the rule; and then to call plaintiff himself, and nonsuit him, and then on return of *posse*, judg-

(1) 8 *Mod. Rep.* 148.

* In a country cause tenants cannot be compelled to appear, till four days after the next issuable term. Barnes, *Rep.* 186. 2 *Stra. Rep.* 1120.

(2) 1 *Sid. Rep.* 361. 2 *Keb. Rep.* 55.

ment will be given against casual ejector. 1 *Salk. Rep.* 260.

Error will not lie upon a judgment in ejectment against the casual ejector. 8 *Mod. Rep.* 118.

III. Execution.

Writ of possession (1) hath relation to *teste*.

Writ of possession, the tenant having neglected to give notice to the landlord, who was an infant, and the landlord made defendant upon (2) terms.

Sheriff to give possession, on plaintiff's shewing (3) and at his peril.

If sheriff gives possession of the *whole*, upon an ejectment for *part*, tenant shall be restored to so much, as he is wrongfully dispossessed (4) of.

Sheriff shall put tenant in common (5) into possession of no more, than an undivided share, and he shall give the same execution in such case as he would do of rent on assize. 12 *Mod. Rep.* 657.

Plaintiff, as in the case of a real action, may execute a judgment in ejectment by entry, without (5) a writ of execution.

Sheriff by giving possession of the land, executes his writ as to a common. 1 *Stra. Rep.* 54.

(1) 4 *Burr. Rep.* 1971.

(2) 4 *Burr. Rep.* 1996.

(3) 4 *Burr. Rep.* 2673.

(4) 3 *Willf. Rep.* 49.

(5) 2 *Sid. Rep.* 156. 1 *Rol. Rep.* 215. Noy's
Rep. 11. Palm. Rep. 263. 12 *Mod. Rep.* 398.

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Ejectment for non-payment of rent, under stat.
4 Geo. 2. c. 28. sect. 2.

Where the landlord or lessor has right to re-enter for non-payment of rent, he may, without any formal demand or (1) re-entry, in case no tenant be in actual possession of the premises demised, serve a declaration in ejectment, or in case the same cannot be legally * served, or no sufficient distress be to be found on the premises, affix the same upon the door of any demised messuage, or in case there be no messuage, then upon some notorious place of the lands. Stat. 4 Geo. 2. c. 28. sect. 2. *Barnes* 173. *Lofft's Rep.* 266, 273.

Where an ejectment is brought against a tenant for non-payment of rent, the tenant may at any time before trial pay into court (2) the arrear and costs, and thereupon proceedings shall stay. 4 Geo. 2. c. 28. s. 4. 8 *Mod. Rep.* 345. 10 *Mod. Rep.* 383. *Andr. Rep.* 343.

Proceedings were stayed in ejectment by the landlord, upon payment of rent, arrear, and costs, though the ejectment was not merely founded on the act, but brought on a clause of re-entry in the lease for not repairing; plaintiff had liberty to proceed on any other title. *Bul. Ni. Pri.* 91. See *Cas. temp. Hardw. Ch. J.* 108.

Tender of rent, before ejectment served, shall stay proceedings. 2 *Bl. Rep.* 746.

(1) See 1 *Salk. Rep.* 259. 2 *R. Raym.* 750.

* See ante, 6. *Services.* p. 104.

(2) The courts had done this, antecedent to the act. *Bul. Ni. Pri.* 91.

After judgment was given against the casual ejector, and before any writ of possession was executed, court of *B. R.* made a rule to stay proceedings, on payment of all rent due and costs; it not being pretended, that the ejectment was brought on any other title, than a re-entry for non-payment of rent. *2 Stra. Rep.* 900.

Vacant possession.

Ejectment (1) on a vacant possession in *London* or *Middlesex*, on stat. 4 *Geo. 2. c. 28. s. 2.* may be moved at any time in term; and is not within the old rule of *Charles the (2) second*, concerning motions in ejectment.

The court of *Common Pleas* made a rule for judgment, where notice to appear was not on the first day, but in the beginning of *Michaelmas* term, unless some person claiming title, appeared within four (3) days, the possession being vacant.

In all cases of vacant possession, unless such as are within the stat. 4 *Geo. 2. c. 28. s. 2.* which is concerning landlords by lease, with a clause of re-entry, no instance can be shewn, where any person claiming title, hath been let in to defend; but he who (4) can first seal a lease, will obtain possession, and any other person claiming title, may eject him if he can; and by the course of the court, no defence can

(1) *Barnes*, 172.

(2) *Viz.* of *Trinity* term, 32 *Car. 2.* which relates only to declarations in ejectment, served upon tenants in possession. *Barnes*, 172.

(3) *Barnes*, 175.

(4) *Bul. Ni. Pri.* 91. *S. P.*

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be made in such case, but by the defendant, in ejectment, who is a casual (1) ejector.

There being a vacant possession, a lease was sealed on the premises, and defendant ejected lessee, and then gave warrant of attorney to confess judgment, which the court of King's (2) Bench set aside, declaring, at the same time, that they considered it as a trick.

A very (3) little matter is sufficient to keep possession; where defendant had left some (4) beer in the cellar, and where another had left some hay in a barn, was held to be keeping possession; in the former case, the landlord proceeding, as on a vacant possession, the judgment and execution were set aside with (5) costs.

In the case of renting ground, to which there is no house or barn, and in all cases, if it is known, where the tenant lives, he must (6) be served, though the houses are empty, the premises deserted, or the possession vacant.

Ejectment on mortgages.

The preamble to stat. 7 Geo. 2. c. 20. recites, that mortgagees frequently brought actions of ejectment for the recovery of lands and estates then mortgaged, and brought actions on bonds given by mortgagors to pay the money, secured by such mortgages and for performing of the covenants therein contained, and did likewise commence suits in the courts of equity, to foreclose their mortgagors from redeeming

(1) Barnes, 177.

(2) 1 Str. Rep. 531.

(3) Bul. Ni. Pri. 91.

(4) 2 Stra. Rep. 1064.

(5) Bul. Ni. Pri. 91.

(6) Stra. Rep. 1064.

their

their estates; and the courts of law, where such ejectments were brought, had not power to compel such mortgagees to accept the principal monies and interests due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such (1) actions; but such mortgagors were obliged to have recourse to a court of Equity for that purpose, in which case likewise the court of Equity did not give relief, until the hearing of the cause, it is therefore enacted,

By Stat. 1. Where any ejectment shall be brought by any mortgagee, and no suit shall be depending in equity for foreclosing or redeeming such mortgaged lands, if the person having right to redeem, and who shall appear and become defendant, shall, pending such action pay unto such mortgagee, or in case of refusal, bring into court, the principal and interest due on such mortgage, and all such costs as have been expended in any suits of law or equity on such mortgage, (such principal, interest, and costs, to be ascertained by the court where such action is pending, or by the proper officer by such court to be appointed) the monies paid to such mortgagee, or brought into such court, shall be in satisfaction of such mortgage, and the court shall discharge such mortgagor or defendant from the same, and shall by rule of court compel such mortgagee, at the costs of such mortgagor, to re-convey such mortgaged lands, and deliver up all writings in his custody relating to the title.

Motion to stay proceedings on payment of mortgage money and costs pursuant to the

(1) See *Gr. Spir. Bank. Laws*, 262, 263. *Dougl. Rep.* 401, 402.

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above act of parliament; plaintiff shewed cause, and produced an affidavit, that the mortgagee had been at great expence in necessary repairs of part of the tenements in his possession, (the ejectment was brought for the residue) and therefore prayed that the prothonotary might be directed to make allowance for such repairs. *Per Cur.* The rule must follow the words of the statute, the prothonotary will make just deductions and allowances. *Barnes* 176.

Order had been made pursuant to the above act of parliament to stay mortgagees proceeding in ejectment, upon bringing principal, interest and costs in court, and a rule was made to make the order a rule of court *nisi causa*; but it afterwards appearing to the court that notice had been given by the mortgagee to the mortgagor that he insisted upon payment of two bonds, which were a lien upon the estate, the case was adjudged to be out of the act of parliament, and the rule *nisi* was discharged, *Barnes*, 177.

Rule on the above statute to shew cause why proceedings should not be stayed on payment of the mortgage money and costs, was made absolute; lessors of the plaintiff, assignees of the mortgagee, insisted to be paid a bond and a simple contract debt due to themselves in their own right; but the court, said a bond was no lien in equity, unless where the heir comes to redeem, *Barnes*, 182.

Mortgagor, after having mortgaged a copyhold to lessor of plaintiff, took up of him a further sum, upon bond; and motion was made, and rule granted, for staying proceedings in ejectment, and delivering the evidences to the heir of the mortgagor, on his payment of
of

of the mortgage money, interest and costs.

Andr. Rep. 341.

Lee, Chief Justice said, that before stat. 7 Geo. 2. c. 20. the court of *King's Bench* exercised this discretionary power in the case of a mortgage, for non-payment of rent, wherein the court, according to the rules of equity, did stay the party from proceeding at law, by compelling him to take the money really due to him. *Andr. Rep.* 343.

Other matters, applicable to the foregoing particulars.

Tenant in possession cannot appear to declaration, after time allowed for appearing, by common rule, be expired. *Say. Rep.* 151.

Defendant shall not avail himself in ejectment, by an estate which makes part of the title of the lessor of the plaintiff. *Cowp. Rep.* 128.

Such lessor shall not be permitted to defeat his own deed. *Cowp. Rep.* 597.

If such lessor be an infant, his guardian undertaking for costs, is sufficient. *Cowp. Rep.* 128.

When possession of tenant is adverse, not necessary to give him notice to quit, in order to support an ejectment against him. *Cowp. Rep.* 628.

More latitude is allowed in ejectments, than in real actions; sufficient certainty is enough. *1 Burr. Rep.* 144.

Plaintiff shall recover according to his title, where he demands more than he has a title to. *1 Burr. Rep.* 329.

I 4 Same

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Same precision not requisite in this fictitious action, as in a precipe in a real action. 1 Burr. Rep. 629. 5, 2673. 1 Stra. Rep. 695.

Where an ejectment is brought, there can be no disseisin, for plaintiff may lay his demise, when his title accrued, and recover profits from time of demise; and entry confessed is previous to making lease, but there is no real or supposed re-entry after ejectment; whereas, if it was considered as a disseisin, no mesne profits could be recovered, without an actual real entry. 1 Burr. Rep. 111.

It is always necessary for plaintiff to shew, that his lessor had a right to enter, by proving possession within twenty years, or accounting for the want of it under some of the exceptions allowed by the statute of limitations. 1 Burr. Rep. 119.

Defendant in ejectment need not plead statute of limitations, as defendants, in other actions, must. 1 Burr. Rep. 119.

Upon a special verdict in ejectment, it ought to appear, that lessor of plaintiff might enter, at the time when he brought the ejectment. 1 Burr. Rep. 119.

Lease under a power, made unfairly, and in prejudice of those in remainder, found in custody of maker, at his death, amongst his own muniments, ought, at the trial, to be presumed to have been surrendered, to let in the statute of limitations. 1 Burr. Rep. 126.

Ancient demesne may be pleaded in ejectment, by leave, and upon proper affidavit. 2 Burr. Rep. 1047. without affidavit. 2 R. Raym. 1418.

Writ of error brought by landlord made defendant, according to stat. 11 Geo. 2. chap. 19. *sett.*

sett. 13. sufficient reason against taking out execution. 2 *Burr. Rep.* 757.

Verdict cures defect in setting out title, though it cannot cure a defective title. 2 *Burr. Rep.* 1161, 1162.

Proceedings stayed, till lessor of plaintiff should give security for costs, his residence being in Ireland. 2 *Burr. Rep.* 1177.

New trials may be granted in ejectment causes, as well as in others. 3 *Burr. Rep.* 1255, 4, 2224.

It's great advantage is, that being under the controul of the court, it may be so managed and modelled as to answer every end of justice and convenience. 3 *Burr. Rep.* 1292, &c. 1300, &c.

Landlord admitted as co-defendant, or to defend alone. 3 *Burr. Rep.* 1292, &c. 1300, &c.

On a writ of error in parliament, brought upon a judgment in ejectment, court obliged plaintiff in error to enter into rule, not to commit waste during it's pendency. 3 *Burr. Rep.* 1823.

Confession after entry, and ouster, is sufficient to bar a non-suit for want of proof of actual ouster. 3 *Burr. Rep.* 1897.

Such confession not sufficient to avoid a fine, there must be an actual entry proved. 3 *Burr. Rep.* 1897. *Cas. temp. Lord Hardw.* 160. 2 *Str.* *Rep.* 1086.

Such confession sufficient, in ejectment upon a condition broken, and in case of a tenant in common. 3 *Burr. Rep.* 1897.

Trustees shall not recover possession from, or dispute it with their *cestui que trust*. 3 *Burr. Rep.* 1901.

Plaintiff

Plaintiff cannot maintain action for mesne profits against casual ejector. 8 *Mod. Rep.*

118.

Ejectment cannot be maintained, contrary to the lessor's own covenant. 4 *Burr. Rep.* 2209.

Leave to plead to jurisdiction in ejectment, before judgment *nisi* against casual ejector. 1

Bl. Rep. 197.

Proceedings in ejectment shall stay, till costs of former ejectment paid. 8 *Mod. Rep.* 226.

2 *Bl. Rep.* 904, 1158, 1180. See 1 *Str.* *Rep.* 554.

Court will not endure lessee to defend alone, ejectment against his landlord, on a supposed defect of title. 2 *Bl. Rep.* 1259.

Taking possession under a judgment in ejectment is not a disseisin of the freehold. 1 *Burr. Rep.* 113.

If by any intendment judgment in ejectment, after verdict, can be made good, court will do it. 1 *Wils. Rep.* 1. 2 *Str.* 1180.

Where landlord is made defendant, plaintiff must prove landlord's tenants in possession of premises in question. 1 *Wils. Rep.* 220.

There can be no mesne profits at all recoverable in case of tenants in common. 12 *Mod. Rep.* 657.

Ejectment of lands will not lie against tenant at will, before half a year's notice has been given him to quit possession. 3 *Wils. Rep.* 25.

Action for mesne profits lies for one tenant in common, who recovers against another in ejectment. 3 *Wils. Rep.* 118.

Tenant may always deduct land-tax, unless agreement to the contrary. *Say. Rep.* 79.

Ac-

Acceptance of single rent waiver of double rent, and acceptance of rent, since forfeiture of lease, seems waiver thereof. See stat. 4 Geo.

11. chap. 28. Cowp. Rep. 245.

Subsequent agreement, may, by relation, operate to make reservation of rent good from beginning. Cowp. Rep. 781.

Mere acceptance of rent for occupation, subsequent to expiration of notice to quit, not of itself waiver of notice. Cowp. Rep. 243.

For more respecting rent, See action of debt, ante, p. 8, &c.

Action or writ of assise lieth where a man is put out of his lands or tenements, and thereby disseised of his freehold therein: and tenants in fee-simple, fee-tail, or for term of life, may have *assise of novel disseisin* of these things following:

1. Assise of lands and tenements.

2. Assise of rents, commons and tolls.

3. Of an office held for life, &c.

1. An assise may sometimes be brought for entries, and disturbance in the possession of lands, where trespass *vi & armis* may not be had: and assise will lie in some particular cases that ejectment doth not, because the things may be put in view to the jury. F. N. B. 7. 8 Rep. 47.

As the grand assise serves for the right of property; so the petit assise serveth for the possession; but assise must be of an actual freehold, not a freehold in law; and if lessee for years, or tenant at will be ousted, the lessor or he in remainder may have assise, for the freehold

hold was in him at the time of the disseisin: also if a person, who hath title to enter, set his foot upon the land, and is ousted, that is a sufficient seisin to bring an assise. *Horn's Mirr. Kel.* 109.

In assise, when the party purchaseth the writ, he ought to find sureties in the Chancery; and the court of *Common Pleas*, or *King's Bench*, may hold plea of assises of land in the county of *Middlesex*, by writ out of Chancery; in other counties, such pleas must be tried at the court of assises: and in actions of assise, the land, damages and costs are recovered. *Lil. Abr.* 105.

The complaint need not be so certain in assise as in other writs; but the plaintiff must prove his title, then his seisin and disseisin: and the demandant in assise may abridge his plaint after the jury are charged, before verdict given. In this action the judgment is to recover the land, &c. by view of the recognitors; and if they may put the demandant in possession, it is well enough; and the party recovering shall have writ of seisin, &c. *Dy.* 84. *Danv. Abr.* 580, 583.

2. If a man have a rent issuing out of land for life, in tail, or in fee, if he be disseised of the rent, he shall have an assise: and if certain rent be granted out of the house, &c. and *fine-pence* is given in the name of seisin, it is good; so that the rent being demanded at the house whence it issues, on non-payment it is a disseisin, for which assise lieth. *New Nat. Brew.* 440. *Cro. Car.* 900.

A man is seised of parcel of a rent payable at a day, and afterwards the tenant will not pay the residue thereof due at the same day: he who

hath right to the rent, may bring an assise of novel disseisin for the whole rent, as well of that which he is seised, as of the residue: and that seisin of part of the rent shall be a seisin of the whole. But if a person distrains for his rent pending an assise, he shall abate it, and assise lies not for an annuity, &c. *Bro. Affs.* 302. *Fitzh.* 288.

Assise may be had of several rents, or of land and rent, and offices and profits, all in one writ. An assise lies for common (1) of pasture for a man's cattle, &c. which is so necessary, as without it his freehold cannot be manured: and if a man have any profit whatsoever granted to him out of lands for life, or in fee, he shall have assise, if he be disseised of it, so of (2) toll, tronage, pontage, or pannage. *Br. Affs.* 127, 145. 2 *Inst.* 411.

3. An assise lay at common law for an office; and therefore, tho' the statute of *Wesim.* 2. mentions only offices in fee, yet assise lies for an office for life: and assise may be brought by officers where their proceedings are according to the civil law, for the right of such offices is determinable at common law. But if the office be only of charge, not of profit, assise doth not lie thereof. 8 *Co. Rep.* 47. *Danv. Abr.* 579.

The taking 3 *d.* of *A.* for a *capias* against *B.* is a sufficient seisin of the office of filazer of the *Common Pleas*; and seisin of an office may be alledged by taking money for the business done,

(1) Common can only be for cattle levant and couchant on land. 2 *Wils.* 2. *Rep.* 274.

(2) Tolls are rateable to the poor. *Dougl. Rep.* 305. Toll thorough is against common right, therefore consideration must be shewn to support demand thereof. 4 *Burr. Rep.* 1404, 1407. See 2 *Wils. Rep.* 109.

and

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and the place where the officer sat be put in view: if the office extends into divers towns, or counties, assise lies for the profits in any town or place, &c. And if one be ousted of parcel of the profits of his office, this, may be alledged to be an ouster of the whole: tho' by *Coke's Reports*, he shall have assise only of the part of the profits whereof he is disseised; and not of the whole office, unless he be disseised of the whole. *Dy. 114, 63. 8 Rep. 49.*

In assise for an ancient office, the demandant in his plaint need not shew what fee or profit is belonging to it; but in a newly erected office he must: and if the assise concerns the king and his prerogative, the judges may be prohibited to proceed therein, by writ *de non ulterius prosequendo rege inconsulto. 8 Rep. 49. Nels. Abr. 277.*

There is an *assise of mortdancestor*, that lies where a man's father, mother, brother, sister, uncle, aunt, &c. died seised of lands in fee-simple, and after their deaths a stranger abateth or enters into the same: which is good as well against the abator, as any other in possession; but it lieth not against brothers or sisters, &c. only against strangers. *Reg. Orig. 223. Co. Lit. 242.*

And *assise of darrein presentment*, where a man and his ancestors have presented a clerk to a church, and after the church becoming void, a stranger presents his clerk to the same church, whereby the person having right is disturbed, &c. *Reg. Orig. 30.*

See the case and form of the whole proceedings on a trial at bar, in a writ of right patent, learnedly, and accurately, reported at large, in *3 Will. Rep. 419, 541. 2 Bl. Rep. 891,*

891, 941. *Loffi's Rep.* 496, 515. 3 *Bl. Com.* 167, 337. 4, 346, 418.

Action of waste is that which is brought on any destruction being made in houses, lands, &c. by tenant for life, or years, to the damage of him in reversion or remainder: It lieth,

1. For any waste done or suffered to houses.
2. For cutting down timber trees, or other trees on an estate.
3. For ploughing up meadow ground, digging mines, destroying deer, &c.
4. And who shall bring this action, for the land, &c. and damages.

1. To pull down a house by any tenant, except the same be ruinous, and in order to rebuild it of the same dimensions only, is waste in such tenant; so if he suffer his house to be uncovered, or in decay, though there be no wood upon the premises: and it is the same to permit a house to be burnt by negligence, if the tenant do not repair the same; and in these cases action of waste lies. But if the house be consumed or destroyed by thunder, lightning, tempest, floods, enemies, &c. it is no waste in the lessee. *Co. Lit.* 52, 53. *Kelw.* 87.

The converting of a brewhouse into tenements, altho' of a greater value; or if a corn-mill be converted into a fulling-mill, &c. it is waste; for things must be used in their natural and proper manner, and not be altered. Taking away or breaking down wainscot, doors, windows, benches or coppers fixed to a house, will be waste actionable: though if any of these are set

set up by the lessee, he may take them down before the end of his term, so as he do not thereby weaken the freehold. *Lev.* 309. *Cro. Jac.* 182. *Salk.* 368.

If a lessee covenants to leave a house at the end of the term in as good condition as he found it; and during the term he doth waste therein, action doth not here lie presently, because the house may be repaired before the time expires: but 'tis otherwise in such covenant for leaving wood or timber, if it is cut down by the lessee; for then it is not possible for him to perform his agreement, to leave the same as he found it. *4 Rep.* 62. *5 Rep.* 11, 21.

2. Timber on an estate is parcel of the inheritance, and reserved by law to the lessor, or landlord; and therefore it be cut down by the lessee, or tenant, the lessor may take it away: and the lessor having an interest only in trees while standing, as in the fruit, shrowd, shadow, &c. if he sells timber-trees, or doth any other act whereby they may decay, 'tis waste in the lessee. *4 Rep.* 61, 62.

The selling or cutting down of timber-trees, such as oak, ash, elm, or lopping them to sell, or any intent, but for repairs; and if they are so felled for building a new house, or young trees be cut for reparations, when there is other timber, these are waste, for which this action lieth: and so it is, to cut down beech (1) trees, where used as timber in building; or willows, maple-trees, &c. standing in defence of a house, or planted for fencing a manor. *Co. Lit.* 53, 88.

Cutting down fruit trees, if they grow in an orchard, or garden, tho' used for repairs of

(1) See 3 Burr. Rep. 1310.

the house, &c. is waste; but 'tis not so if they grow in a field: the suffering young germins to be destroyed by cattle; or stubbing up a quickset hedge, &c. are waste; as are also cutting down green wood, if there is dry, or more fire-bote, than is necessary. *Co. Lit.* 53. 3 *Nell. Abr.* 540.

But tenants may cut underwood, and take wood sufficient to repair the pales, hedges, and fences, and what is called by law plough-bote, fire-bote, and other house-bote.

3. If ancient meadow-ground is ploughed up, it is waste; but where meadow hath been at any time arable, or sometimes meadow and sometimes pasture, it will be no waste, to plough it up. The ploughing of lands, that have not been ploughed up time out of mind, or to plough up wood-lands; and it is said, if a tenant converts arable land into wood, meadow into arable land, arable into meadow, or pasture into arable; they will be waste. 2 *Rel. Abr.* 814. *Co. Lit.* 53.

A lessee for years converts a meadow into hop-ground; it is no waste, because it may be easily made meadow again: but the converting it into an orchard is waste, tho' it may be more profitable. It is waste to suffer a wall of the sea to be in decay, by reason whereof the meadow-ground is surrounded with salt-water, and rendered unprofitable; also the not scouring of a mote or ditch, whereby the groundfils of the house, &c. are rotten, is waste actionable. 2 *Leon.* 174. *Owen* 43.

The digging mines of metal, coals, &c. hidden in the earth, and that were not open when the tenant came in; or for lime, brick, stone, &c. without power by covenant, will be waste: tho' the tenant may dig in an open mine, and

for gravel, clay, earth, &c. for reparations of the house. Destroying deer in a park, doves in a dove-house, or fish in a pond, &c. or if such stores be not left by the lessee, as he found when he entered on the land, it is waste; and so is any thing which abridges the lessor's annual profits of the lands. *Co. Lit.* 53, 54. *5 Rep.* 12. *3 Leon.* 76.

If a lease be made without impeachment of waste, it takes off all restraint from the tenant of doing it; and in such case he may pull up, or cut down wood or timber, or dig mines, &c. at his pleasure, and not be liable to any action of waste. *Plowd.* 135.

4. This action must be brought by one who hath an estate in fee-simple or fee-tail; and it ought to be he that hath the immediate estate and inheritance in fee-simple, &c. For if there be any estate for life between the first estate and that of the remainder-man in fee, the waste will not be *ad exhereditationem* of him in remainder. *5 Rep.* 75.

Action on the case, in nature of waste is maintainable against tenant for years, after the expiration of the term. *2 Bl. Rep.* 1111. Action of waste will lie against tenant by the curtesy, in dower, for life, &c. and if tenant in dower, or by the curtesy assign their estates, the heir or he in remainder may have this action against them for waste done after the assignment: but it lieth not against tenants in fee-simple, or in fee-tail, or tail after possibility of issue extinct; nor against tenant by statute-merchant, staple, or elegit, tenants in mortgage, or at will; or against any executor or administrator, for waste committed by the testa-

tor, &c. Co. Lit. 54, 310. 6 Rep. 37. A 9 Rep. 138. If a man makes a feoffment, to the use of himself for life, and after his death, to the use of another person and his heirs; in this case, if the feoffor commit waste, it has been adjudged that the feoffee shall have a special writ against him. And before any waste is done, a *prohibition*, may be had, directed to the sheriff, not to permit it; or he in remainder, &c. may have an *injunction* out of the chancery, to stay the waste, and enter a house or lands to see if waste is committed. *Hell. 79. F. N. B. 55. Co. Lit. 53. 2 Inst. 306.*

On any waste being done in any houses, or in woods, so much will be recovered wherein the waste is done; but if the waste be here and there through the whole, then all shall be recovered in this action; and the judgment in action of waste is, that the plaintiff shall recover the place or places wasted, and treble damages. *2 Inst. 303.*

Here follow some particular cases, and instructions relating to,

1. *Distresses for rent, and proceedings therein.*
2. *Replevins on taking distresses.*

1. Distress is a thing which is taken and distrained upon land, for rent behind, or other duty: and a man may distrain for rents reserved upon a gift in tail, lease for life, or years, &c. altho' there be no clause of distress in the deed or lease, so as the reversion be in himself; but it is otherwise on a feoffment in fee. *Co. Lit. 57, 205.*

Of Distresses and Remedies.

A distress taken for rent must be of goods or things valuable, whereof some body hath property, not the distrainer; and ought to be made of such things whereof the sheriff may make replevin: an horse at a farrier's to be shod; or bringing goods to market to be sold; goods on a wharf, or at a warehouse for exportation; or in the hands of a factor, or delivered to a carrier, to be carried for him; or wool in a neighbouring barn; cloth at a weaver's, or at a taylor's; a horse with a rider on it, or any thing one carries about him; utensils of trade, cattle of the plough, beasts of husbandry, horses joined to a cart, or sheep, may not be distrained; nor may an horse in an inn, goods in a market, another man's garment, in the house of a taylor, &c. neither shall any thing fixed to the freehold; as a furnace, &c. *Rel. Abr.* 664, 666. *Co. Lit.* 47. *Ventr.* 36. *Sid.* 440. *3 Burr. Rep.* 1498, &c.

But corn thrashed and in the straw; carts with corn, not victuals: and hay in a barn, &c. may be distrained: so may money in a bag sealed; tho' not money out of a bag, &c. And a distress may be taken of cattle driving to market, if put into pasture by the way; also beasts of a stranger, in the landlord's ground, being levant and couchant, and having well rested themselves there; and another's goods in the tenant's house, &c. And distresses are to be taken on the premises; in the taking whereof, one may not break open * gates, or enter houses, if the doors

* Upon a question about taking a distress, it was held, that a padlock put on a barn door could not be opened by force to take the corn by way of distress; by lord Ch. Just. *Hardwicks.* 8 *Vin. Abr.* 128. pl. 6, at top.

are open. *Co. Lit.* 47, 161. *Lutw.* 214. 4 *Mod.* 385.

If a landlord comes into a house, and seises on some goods in the name of all of them, it is a good seizure and distress of all; 6 *Mod.* 215. 9 *Vin. Abr.* 127. *Ld. Raym.* 54. 2 *Bac. Abr.* 114. 115. 2 *Ld. Raym.* 1424. *Barnard. K. B.* 34. 2 *Str.* 717, 851, 1272. 10 *Mod.* 265, 266. but the goods are generally to be removed immediately, unless it be corn or hay, by statute: and when a distress is taken of household goods, or other dead things, they are to be locked up and impounded in a house; and if the distress is damaged, the distrainer must answer it. A distress of cattle must be brought to the common pound, or kept in an open place; when notice is to be given the owner to feed them; and cattle distrained may not be used, except by milking, &c. for the owner's benefit. *Cro. Jac.* 141. 5 *Rep.* 90. *Co. Lit.* 96.

In case a tenant or any other, to prevent the landlord's distress, drives the cattle off the ground, the landlord may make fresh pursuit, and distrain them: and debt will lie for rent where a distress may not be taken for one rent there cannot be two distresses, if there were sufficient goods, when the first was made; but if there be not then enough for a distress, it may be taken afterwards; or distress may be for part of the rent, and action of debt for the rest thereof. But if the owner of goods tenders his rent, and a distress is afterwards taken, it is wrongful: and if any person shall distrain another on purpose to injure him, he shall pay treble damages. If where no rent is due, distress and sale be made, the owner of the goods distrained may recover double value and costs. *Co. Lit.* 160. 2 *Lev.*

Of actions and Remedies.

8 Rep. 147. 2 Inst. 107. 13 Ed. 1. Stat. 2
W. & M. Jeff. 1. c. 5.

All distresses are to be reasonable, by our ancient statutes; and none shall take an unreasonable distress, on pain to be amerced: they shall not be taken in the highway, nor in the ancient fees of the church; and no distress of cattle shall be driven out of the county, or out of the hundred where it is taken, except to a pound overt within the same shire, not above three miles distant from the place where taken; neither shall a distress be impounded in several places, whereby the owner may be constrained to sue several replevins for the delivery thereof, under the penalty of 5*l.* and treble damages: and not above 4*d.* to be taken for the poundage of one distress, (or less where usually given, on the same penalty, &c.) Stat. 51 H. 3. 52 H. 3. c. 4. 3 Ed. 1. c. 16. 9 Ed. 2. c. 9. 1 & 2 P. & M. c. 12.

And by statute, where any goods or chattels shall be taken as a distress, (in the day-time, it must not be in the night,) for rent reserved and due upon any lease or contract, and the tenant or owner of the goods shall not within five days after such distress taken, and notice thereof, with the cause of taking, left at the mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law; then the landlord or person distraining, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where the distress shall be taken (who are required to be aiding and assisting therein) may cause the goods and chattels to be appraised by two sworn appraisers,

praisers, whom such sheriff or constable are empowered to swear to appraise the same truly; and after such appraisement made, may lawfully sell the goods for the best price that can be gotten, towards the satisfaction of the rent, and the charges of the distress, appraisement and sale; leaving the overplus, if any be, in the hands of the sheriff or constable, for the owner's use.

Stat. 2 W. & M. sess. 1. c. 5.

It shall be lawful to distrain, for rent arrear, any sheaves or cocks of corn, or loose corn or hay in any barn or granary, or upon any hovel, stack or rick, or otherwise; and to lock up and detain the same in the place where found, 'till it be replevied as aforesaid; and in default thereof, within the time aforesaid, to sell the same after the appraisement made, &c. so that nevertheless it be not removed by the persons distraining, to the damage of the owner, but kept where it shall be found and seized, as impounded, 'till the same is replevied or sold.

Stat. ibid.

And if any pound breach or rescous shall be made of goods or chattels distrained for rent, the person grieved shall have a special action upon the case for the wrong thereby sustained, and recover treble damages and costs of suit against the offenders, or against the owner of the goods distrained, if they afterwards come to his use or possession.

Where rent is reserved on lease, if the tenant shall fraudulently or clandestinely convey away or carry off his goods, the landlord or any person empowered by him, may in five days after, take and seize such goods and chattels wheresoever they shall be found, as a distress for the rent in arrear, and sell the same, as if they had

been actually distrained on the premises; except goods sold for a valuable consideration, before the seizure made: and where leases are expired, distress may be taken for arrears of rent, after the determination of the said leases, as if they had not been ended; provided such distress be made within six kalendar months after the end of the lease, and during the continuance of the landlord's interest or title, and the possession of the tenant from whom the rent is due. And these distresses shall be liable to such sales, and in such manner, and the money be distributed, as by the act 2 *W. & M.* is directed. *Stat. 8 Ann. c. 14.*

For cases on this clause of the statute, See Fortesc.

Rep. 359, 360.

Stra. 214.

11 Vin. Abr.

133, 134, in Marg.

Stra. 97.

Gilb. Eq.

Rep. 223,

224.

Stra. 212.

11 Vin. Abr.

130. pl. 30.

Stra. 643.

Stra. 787,

1024.

Andr. 218, 219. Bunb. Rep. 42, 43. Burn's Just. 4to, 313.

If there is an execution against goods or chattels of a tenant for life, or years, &c. the plaintiff, before removal of the goods, by the execution shall pay the rent of the land, &c. so as there be not above a year due; otherwise they shall not be taken or extended: and if more rent is in arrear, paying a year's rent, the plaintiff may proceed in his execution, and the sheriff or other officer is to levy as well the money so paid for rent, as the execution-money. *Ibid.*

An ejectment may be brought for rent due, where there is no sufficient distress, &c. And all persons shall have the like remedy by distress and sale, for rent seck, rents of assise and chief rents, as in case of rent reserved upon lease. *Stat. 4 Geo. 2. c. 28.*

And it is ordained, that tenants of lands, &c. fraudulently carrying away their goods, to prevent distress for rent; the landlords in thirty days after may distrain them wherever they are,

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as if upon the premises; and such tenants and other persons assisting in the fraud, shall forfeit double the value of the goods, recoverable by action of debt, &c. And where the goods are under 50*l.* value, two justices of peace may examine into it, and order such offenders to pay the forfeiture, leviable on their goods and chattels, or for default, to be committed to the house of correction for six months. 11 *Geo.* 2. c. 19.

Order made for two justices, reciting that a complaint had been made to them in writing, by *A. Clavey* against *J. Bissex*, that he the said *Clavey* demised his estate in the parish of *Shelly*, in the county of *Somerset*, to *William Thatcher*, at the yearly rent of 44*l.* and that there was due and in arrear from *Thatcher* to him for rent to the said estate, on the 5th day of *April* last, 24*l.* 15*s.* 8*d.* $\frac{1}{2}$; and that he the said *Clavey* would have distrained the goods and chattels of the said *W. Thatcher* upon the said estate, in order to obtain satisfaction of the said rent; but to prevent him from so doing, the said *Bissex*, on or about the 27th, 28th, and 29th days of *August* last, did knowingly and willfully aid and assist the said *Thatcher* in fraudulently conveying and carrying off from the said estate his the said *Thatcher's* goods and chattels, and also in concealing the same, being under the value of 50*l.* that is to say, two cows, one heifer, ten hundred weight of cheese, of the value of 20*l.* whereby the said *Clavey* was prevented from distraining the same, in order to obtain satisfaction for the said rent, and contrary to the statute 11 *Geo.* 2. and therefore praying us to grant him our warrant of summons, requiring you the said *J. Bissex* to appear before us, and that

It is not necessary to allege expressly in this order, when the rent became due, or that it was due, at the time the tenant carried off his goods; or against the person who assisted the tenant in carrying off his goods, that the tenant did carry off his goods. Say. Rep. 306. 307.

that we would examine the facts, and thereupon make such order therein for his relief, as the said statute directs and requires, and as should be agreeable to justice: whereupon we the said justices, residing near the said estate from whence the said goods and cattle were removed, and neither of us any way interested in the said estate, did issue our warrant of summons, requiring you the said *J. Bissex* to attend us thereon to answer the said complaint; and you having attended accordingly, and we in your presence having examined the witnesses produced by the said *A. Clavey* upon oath, and heard what was alledged by you in your defence, do adjudge that the said complaint is true; and that the said goods and cattle of the said *W. Thatcher*, in which you so aided and assisted in conveying and carrying off from the said estate, and also in concealing the same, were of the value of 20*l.* and that you have thereby forfeited double of the value of the said goods and cattle, being the sum of 40*l.* to the said complainant *A. Clavey*, by virtue of the statute: we therefore, in pursuance of the said statute, do adjudge, order, and require you the said *J. Bissex* within the space of three days from the date hereof, to pay to the said *A. Clavey* the sum of 40*l.* which if you shall neglect to do, such further proceedings will be then had against you to enforce the payment thereof, as the said statute directs and requires. Given under our hands and seals this 5th day of *January* 1756. This order was affirmed by the sessions upon appeal. Both the orders were removed by *certiorari* into the *King's Bench*. It was moved to quash the same. Objections taken: 1. The complaint is said to be taken in writing, but not upon oath.

2. It is only said, that he demised to *W. Thatcher*; but not said for what estate or term. 3. It is stated, so much due for rent, but not said for what term: it might be due twenty years ago. It is not stated to be due when *Thatcher* moved the goods. 4. The words of the order are, goods and *cattle*; of the statute, goods and *chattels*. 5. No certain time is alleged when the defendant aided and assisted; only said on or about the 26th, 27th, or 28th of *August*. 6. Not stated that *Thatcher* did carry off his goods: only that *Bissex* did aid and assist him in carrying them off. 7. They adjudge the complaint true, but do not state the evidence, and this is a conviction, not an order: and for any thing that appears, it might be upon *Clavey's* evidence alone. 8. It is not stated that the goods were under the value of 50*l.* which is the ground of the justices jurisdiction. 9. The words of the statute are, if any person shall be a tenant of any lands, tenements, or hereditaments: the word used in order is estate, which may be a thing incorporeal, or may mean the interest in the land, and so not within the statute. 10. It shall appear, whether the landlord has a right to distrain: by 8 *An. c. 14*, the landlord may distrain at any time within six months after the expiration of the term: it doth not appear these six months were not expired, and if they were, this is no offence. After consideration, Mr. Justice *Denison* delivered the resolution of the court: I think the most material objection is, whether this is an order or a conviction. If a conviction, the evidence ought to have been set out. And there has been no doubt (notwithstanding the case of *K. and Pulleine*, *Salk.* 369.) that in

Of Actions and Remedies.

a conviction the evidence must be set out, that the court may judge upon it. So it was held by Lord *Hardwicke* in the case of *K. and Lloyd*. 2 *Stra.* 996. 2 *Barnard. K. B.* 302, 310, 338, 466. *Sess. Cas.* 233. pl. 190. and in that case it was objected, that as it subjected the party to a penalty, though in the statute it was called an order, yet it should be construed as a conviction: but the court said, every act of the justices, which subjects the party to a penalty, shall not be construed as a conviction. *K. and Venables*, *Stra.* 630. 2 *Ld. Raym.* 1406. *Forbes. Rep.* 325. *Sess. Cas.* 267. pl. 210. *Cas. of Set. and Rem.* 163. upon the statute for licensing alehouses, considered as an order. *K. and Blackwell*, *M. 4 Geo.* which the court said was a strong case, and must be considered as an order. I understood from my Lord *Hardwicke*, in the case of *K. and Lloyd*, that his ground of the difference was founded upon the expressions of the statute, and not upon the penalty; as where the words of the statute are, "of which he shall be convicted," it is to be construed as a conviction. Here it is extremely strong; the statute calls it an order: and in the nature of it, it is an examination upon a complaint. If the party was never summoned, this court upon affidavit will grant an information against the justices: but the summons need not be set out; and the court will intend the justices have done right, in case the contrary does not appear upon the face of the order. As to the first objection: this is not an information, but a complaint: when the party is summoned, the witnesses are to be examined upon oath, but the complaint need not be upon oath. In answer to the second objection: as

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the order has followed the words of the statute, we will not intend it a case wherein the justices had not a jurisdiction. The court will not, in case of an order, intend that the justices have done wrong. As to the third objection: it is sufficiently alledged in an order, his assisting the tenant to carry away the goods, as it is here alledged, is sufficient, the rent continued then to be in arrear; and the rather as the defendant might have availed himself of the rent paid, by proving it before the justices. I much doubt, whether in a declaration it would not be sufficient to say, the rent was in arrear at such a day; and I think it would lie upon the defendant to prove that the rent does not remain in arrear. As to its not being said, for what time the rent was due; this is mere matter of form. As to the fifth objection: *about*, in common parlance, means in this case three days or near it. They might be three days in carrying the goods away. The days are not material, even in legal proceedings. *Ld. Raym.* 581. and in the case of *K. and Simpson*, *H. 3 Geo. Str.* 46. the day and hour in a conviction are not material. By this statute no time is limited, when the complaint shall be made: it may be made at any time. Suppose the defendant had paid the penalty on a different complaint made, he might easily have shewn it. As to the sixth, the answer is obvious; if *Thatcher* had not carried his goods away, the defendant could not have aided in carrying them. The statute makes two offences, one carrying the goods away; the other, aiding in carrying them away. It is only necessary here to state the offence which the defendant had been guilty of, which this order does in the words of the statute.

Of Actions and Remedies.

rule. In the case of *K. and Monk, M. 12 Geo. 2.* there was a conviction for aiding and assisting in killing a buck. It was objected, that it was not charged the buck was killed. But the court held, that as the conviction was in the words of the statute, it was sufficient; and the court held they were all principals, as well those that killed the buck, as those that assisted. And this was the case of a conviction. All the other objections may have this general answer; that in the case of orders, where the justices have jurisdiction, we will intend they have acted right; and if they have done wrong, they may be punished by an information. Let the orders be confirmed. *Burn. Just. 410. 304. Say. Rep. 304.*

Landlords may take and seize goods concealed in any house, or out-house, &c. and in case of a dwelling house, on oath made before a justice of reason to suspect that the goods are therein, may with the assistance of a constable break open such house to distrain. *Stat. 11 Geo. 2. c. 19.*

But except it be in this case where the goods are clandestinely conveyed, it may seem from what has been said, that the landlord hath no mean to come at the goods in order to make distress, if the tenant shall think fit to lock up his gates, and shut the doors: which matter may seem to require consideration. *Burn's Justice, 410. pag. 307.*

And any cattle feeding on commons; or corn, grass, or other things growing on the land, shall and may be distrained for rent; and when ripe, cut and cured, a week's notice being given to the tenant where lodged, may be appraised and disposed of towards satisfaction of the

the landlord, if the tenant do not before pay the rent and charges. 11 Geo. 2. c. 19. See *action of ejection*.

The form of a landlord's warrant to distrain for rent.

KNOW all men by these presents, that I T. B. of, &c. do hereby authorise and appoint A. B. of, &c. to take any person or persons to his assistance, and enter into the house of C. D. in, &c. and there make a distress of all such goods and chattels, as are in and upon the premises, for ten pounds, for half a year's rent due to me the said T. B. at &c. last: and after the said goods are so distrained, if the said C. D. doth not within the time limited by the act of parliament for that purpose made, replevy the same, or pay the said rent; then and in such case, I do hereby authorise you the said A. B. to cause the said goods so distrained, to be appraised, and according to such appraisement to make sale thereof to any person or persons, as will buy the same; and to dispose of the money arising by the sale, in such manner as by the said act is directed: and for your so doing, this shall be your sufficient warrant. *Witness my hand* and seal this 3d of May 1764.

T. B.

Note; this warrant or authority is requisite, where the landlord lives at a distance in another place, or would be free from the trouble of distraining himself; and therefore he empowers some other person to do it.

Form

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T. B.

Note; this warrant or authority is requisite, where the landlord lives at a distance in another place, or would be free from the trouble of distraining himself; and therefore he empowers some other person to do it.

Form

Of Actions and Remedies.

Form of an appraiser's oath, to appraise goods distrained.

YOU shall swear that you will faithfully appraise and value the goods now taken in distress, and mentioned in the inventory to you shewn, as between buyer and seller, according to the best of your skill and understanding: you shall not through partiality, interest or otherwise, over or under estimate the said goods, but impartially do your duties herein. So help you God.

The appraisers valuing the goods too high shall be obliged to take them at the price appraised. *Stat. 13 Ed. 1. 2 Shew. Rep. 87. pl. 78.*

The form of an inventory and appraisement of the goods taken in distress.

AN inventory of the goods seized and distrained by A. B. &c. in the house of C. D. of, &c. for ten pounds, and half year's rent due to the said A. B. at Michaelmas last: taken the day, &c. in the year, &c. for the rent aforesaid.

Imprimis in the fore parlour a round mahogany table, a pier looking glass } value, &c.
and six beech matted chairs. }

In the chamber one pair of stairs, a red china bed, &c. }

In the Kitchen, &c.

Valued in all at

By us, witness our hands this day, &c.

E. F. }
G. H. } sworn appraisers.

J. K. constable.

Form

Form of notice of the distress to the tenant.

Mr. C. D.

THIS is to inform you, that I have this
— day of, &c. seized upon your
goods in your house in, &c. for ten pounds,
half a year's rent due to me at, &c. last, and
have taken an inventory thereof, and locked
the same up in your chamber one pair of
stairs, &c. and if you do not pay the rent
due, or replevy the goods mentioned in the
inventory, I shall in five days make sale
thereof, according to the direction of the act
of parliament; of which take notice from,

Yours, &c.

A. B.

Witness, that a copy hereof was this day
delivered to Mrs. M. D. the wife of C. D. by
G. H.

Distress cannot be made for toll of goods
fraudulently sold out of a market to avoid the
toll. *Cowp. Rep.* 661.

In notice for sale of distress for rent, not ne-
cessary to mention, when rent became due, for
which distress is made. *Dougl. Rep.* 279.

Common law exemptions of utensils, tools,
implements of husbandry, from distress, holds
only in distresses for rent in arrear, amerciaments,
but does not extend to poor rates, &c. *1 Burr.*
Rep. 588.

Taking distress for part of entire sum at one
time, and for other part of it at another time,
is great oppression. *1 Burr. Rep.* 589.

L

Remedy

Of Actions and Remedies.

Remedy for taking an excessive distress, is a special action founded on the statute of *Marlbridge*. 1 *Burr. Rep.* 590.

If lessor for years assigns his term, he cannot distrain. 2 *Wals. Rep.* 375.

Carriage standing in a coach-house, belonging to a public livery-stable keeper, and being parcel of, and rented with the livery-stable, of his landlord, is distrainable, as standing at livery, by lessor of premisses, for rent due to him, by the stable keeper. 3 *Burr. Rep.* 1504. *Bl. Rep.* 483.

There is a distress for *damage-feasant*; where the beasts of a stranger are found in another man's ground, without leave of the owner thereof, and there feed, or do other damage to the grass, corn, &c. And here distress may be taken in the night, as well as day, lest the beasts escape before taken: also beasts belonging to the plough, sheep, and horses joined to a cart, or a horse with a rider on it, &c. are liable to this distress, though not for rent; but it must be while the cattle are damage-feasant, and the party may tender amends, until they are impounded, and then detainer is unlawful. *Co. Lit.* 142. 2 *Inst.* 107. 5 *Rep.* 76. 2 *Danv. Abr.* 633.

2. *Replevin* is grounded upon a distress, and is a re-deliverance of it, that the thing distrained may remain with the first possessor, on surety given by him to try the right with the distrainer, and answer the same at law; and if he do not pursue his action, or it be judged against him, then he that took the distress shall have it again, by the writ *retorno habendo*. *Co. Lit.* 145, 161.

If

If notice be not given in writing, on taking a distress, of the things distrained, and for what you distrain them, they may not be sold by the statute 2 *W. & M.* but the distress is to be detained till replevin, or satisfaction: and replevins are by writ at common law; or on plaint by statute, for the party's more speedy having again of his cattle and goods distrained. Here the sheriff ought to take two sorts of pledges, one by the common law, to prosecute; and another by the statute, to return the distress, if the taking be judged lawful; and if the sheriff deliver a distress, without these pledges he must answer the price thereof. *Co. Lit.* 145. *F. N. B.* 69.

Replevin by writ lies in the courts at *Westminster*, and action of replevin may be removed out of other courts, into those courts, and tried there: replevin by plaint may be brought in the county-court, hundred-court, and court-baron. The most usual method to obtain a replevin is by plaint; and the sheriff may take a plaint by statute, and make a replevin presently, and enter it in the county-court afterwards: also sheriffs of counties shall depute four deputies to make replevins, not dwelling above twelve miles distant from one another, under a certain penalty. *Dy.* 246. *Co. Lit.* 139. *Stat.* 1 *P. & M. c.* 12.

If the defendant in replevin claims the property of the goods, the sheriff cannot proceed till it is decided before him by writ *de proprietate probanda*; and if found for the plaintiff, the sheriff is to make replevin or deliverance; but if for the defendant he is to do nothing further: though the plaintiff may replevy by writ afterwards; and if the sheriff returns the pro-

Of Actions and Remedies.

perty claimed, it shall be put in issue and tried in the *Common Pleas*. *Finch* 316, 317.

Where cattle or goods are not delivered upon a first replevin, the party distrained may have an *alias*, and a *pluries* replevin, in the general prosecution of it; and if the cattle are put into any strong place, the sheriff may take the *posse comitatus*, and break into it, to make the replevin: when they are driven out of the county, &c. so that the sheriff cannot make replevin, a writ of *Witbernem* shall go to take so many of the distrainer's cattle, till the party make deliverance of the first distress, &c. and in this case, the cattle taken shall be to the value of those that were first taken and detained. 52 H. 3. c. 21. 1 P. & M. 2 Inst. 140. 13 Ed. 1.

On bringing a replevin, it must be certain in setting forth the number and kinds of cattle distrained: that the sheriff may know how to make deliverance of the cattle, if a writ be directed to him to do it; and the time and place are to be named in the declaration: if the plaintiff in replevin makes default, or is nonsuit, or judgment be given against him, the defendant may have his writ *retorno habendo* of the goods taken in distress. And when the plaint is removed into C. B. &c. and the plaintiff nonsuited, before or after avowry made, the defendant may distrain again for the same cause; but the plaintiff may sue a writ of *second deliverance* upon the same record, to revive the first suit; upon which writ, the sheriff is to take security for the suit, and so make a return of the cattle or price of them, if the return shall be adjudged. *Hob.* 16. *T. Raym.* 33. *F. N. B.* 72.

And after this second deliverance and trial thereon; or if the plaintiff be again nonsuit upon

on a declaration, there must be awarded a *returnum irreplegiabile* to the defendant; and then he may make his avowry, or plea in justification of his distress, to ground a writ of inquiry of damages; or hold the beasts till he is satisfied: in case the defendant make default, the plaintiff shall have judgment to recover all in damages; as well the value of the cattle, as damages for the taking of them, and his costs. And in a replevin, damages and costs are given the defendant, if found for him, such as the plaintiff would have had, if he had recovered in the action, &c. *F. N. B.* 69. *Wood's Inst.* 553. *Stat.* 21 *H. 8.* c. 9. 17 *Car.* 2. c. 7.

In replevin, if the plaintiff be nonsuit, the defendant may make suggestion as in an *avowry* for rent, and on prayer a writ shall be awarded to the sheriff, to inquire of the sum in arrear, and value of the distress, and upon the return thereof, the defendant shall recover the arrears, or the value of the distress with costs, &c. And if the jury do not inquire of the value of the cattle distrained for the rent, that they may be sold according to the statute, and also of the rent due, there shall be no writ of inquiry to supply it. 17 *Car.* 2. c. 7. *Lev.* 255.

The defendant in replevin may avow, or justify; but if he justifies, he cannot have a return, as he shall have if he avows: and an *avowry* is where the taker of the distress avows the taking, if in his own right; and if for another, makes cognizance thereof, as bailiff, or servant, &c. It is in the nature of a declaration, and must contain sufficient matter for judgment to have return; but the avowant need not alledge seisin within the time of the statute of limitations; though the lord must have seisin by

Of Actions and Remedies.

the hands of his tenant in certain. 3 *Lev* 204.
7 *Rep.* 25. *Co. Lit.* 268.

The defendant in replevin is allowed to avow generally, that the plaintiff or other tenant of the land, &c. whereupon distress was made, held it at such certain rent, during the time the rent distrained for incurred, &c. without setting forth the landlord's grant or title; and if the plaintiff become nonsuit, the defendant shall have double costs. Sheriffs and other officers granting replevins, and taking bonds to prosecute with effect, &c. shall at request assign them to the avowant or defendant by indorsement, which if forfeited, the avowant may bring an action, and recover thereupon in his own name; and the court may give reasonable relief to the parties, by rule of the same, &c. by the *Stat.* 11 *Geo.* 2. c. 19.

An avowry may be made either on a distress for rent, or for damage-feasant, &c.

The statutes of limitation of actions are

32 H. 8. c. 2. and 21 Jac. 1. c. 16.

BY the stat. 32 H. 8. c. 2. no person shall have any writ of right for recovery of lands, of the possession of his ancestors, but of a seisin within sixty years next before the *teste* of writ, &c. In assise of *Mortdancestor*, writ of entry *sur disseisin*, or other possessory action upon the possession of an ancestor, it must be brought within fifty years; and in assise, &c. upon the party's own possession, within thirty years, and the plaintiff is barred, not proving such possession, &c. And writs of *formedon* for title to lands *in esse* shall be prosecuted within

within twenty years after the title accrued, by stat. 21 Jac. 1. c. 16.

But there is a proviso in the statutes to relieve infants, feme-coverts, persons beyond sea, or in prison, and the heirs of such persons, so as they commence their suits within the times limited after their impediments are removed. And it has been adjudged, that the act 32 H. 8. doth not extend to rent, or services, &c. out of land: also that one who hath been out of possession for sixty years, if his entry be not taken away, may enter and bring an action for his own possession. *Wood's Inst.* 557.

By statute 21 Jac. 1. c. 16. actions of debt, 7 Mod. 143. actions upon the case, (except for words) actions of account (except concerning merchandize), of 838. detinue, * trover and trespass, are to be commenced within six years after the cause of action, and not after; actions of assault and battery, within four years; and for slander, within two years after the cause of action, &c. And if these personal actions are not brought in the time limited by this statute, they are barred: though where money is to be paid on request, or the consideration of a promise is executory, &c. it is not material when the promise was made, but when the cause of action did arise; and the defendant ought to plead, that *causa actionis non accrevit infra sex annos*, &c. 2 Salk. 422.

The exception in the statute of limitations in actions of account, relates to accounts current only between merchants; for when an account is stated and balanced, debt lies, and the action must be brought within six years. In actions of

* See 15 Vin. Abr. 115.

Of Actions and Remedies.

slander, when words are actionable in themselves, there damages shall be recovered accordingly as they were first spoken, if the action be brought within two years, as required by the statute of limitations; and otherwise the party will be barred thereby: but where the words are actionable in respect of the special damage which happens after the speaking; in such case, if the damage is seven years afterwards, it is no bar. *Mod.* 70, 268. *Sid.* 95.

An action barrable by the statute 21 *Jac.* 1. a fresh promise will revive it; so it is of an acknowledgment of a debt, because that is evidence of a promise; and taking out a writ, and entering and filing it, is an avoidance of the statute; for 'tis a demand, and a good bringing of an action within the time mentioned by the statute of limitations. 3 *Salk.* 228, 229. *Lil. Abr.* 19.

Crown not barred by statute of limitations. *Cowp. Rep.* 215.

No instance of setting up any length of time within the limitation fixed by the statute, as a bar to the demand. *Cowp. Rep.* 216.

If one tenant in common be in possession, and on demand by the co-tenant of his moiety denies to pay, and denies his title, and continues in possession; such possession is adverse, and amounts to an ouster; so that the statute of limitations will run. *Cowp. Rep.* 218.

Where testator devises his estate for payment of debts, courts both of law and equity, hold that all debts barred by the statute shall come in. *Cowp. Rep.* 548.

All *qui tam* actions on statute (except that of tillage;) shall be brought within one year, after offence committed. *Dougl. Rep.* 235. n.
Bill

Bill may be filed in *vacation* against an *attorney* to prevent statute of limitation taking place. *Dougl. Rep.* 313.

There may be cases which fraud will take out of the statute. *Dougl. Rep.* 656.

Acknowledgement of debt, after commencement of action, takes it out of statute of limitations. *2 Burr. Rep.* 1099.

Regular judgment, not to be set aside, tho' obtained by mistake, to let in plea of limitation. *2 Bl. Rep.* 35.

Statute of limitations bars plaintiffs residents in *Scotland*. *Bl. Rep.* 286. does not bind residents beyond sea. *2 Bl. Rep.* 723. *3 Wils. Rep.* 145.

Statute of limitations, in case of promise on contingency, does not run from time of making promise, but from contingency happening. *Bl. Rep.* 354.

Defendant telling a third person, that he went to a fair in order to avoid a person to whom he was indebted, defendant answering, "No, but we will settle the account," to plaintiff's telling him, "he was indebted to him in such a sum," both these cases being within six years, are by the above declarations, taken out of the statute. *Lofft's Rep.* 86, 87.

A year the common limitation, in penal statutes, where moiety goes to informer, and to the poor. *Lofft's Rep.* 330.

If plaintiff be in *England*, at time of cause of action, statute of limitation begins to run, so that if he, or in case of his death abroad, his personal representative does not sue within six years, the statute bars. *Wils. Rep.* 134.

Personal actions die with the person; as of battery, &c. A man attainted of treason or felony,

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felony, convict of recusancy, an outlaw, excommunicate person, &c. cannot bring an action, 'till pardon, reversal, absolution, &c. A feme covert must sue with her husband, and infants by guardians, &c. *Lit. 196. Co. Lit. 128.*

How controversies are determined, without action at law, by award, &c.

AS to controversies determined, without action at law, or redress by the mere act of the parties; they are

1. From the **SOLE** act of the party injured.
2. From the **JOINT** act of all the parties.

Of the first sort are, 1. Self defence. 2. Recaption of goods. 3. Entry on lands, and tenements. 4. Abatement of Nuisances. 5. Distress for Rent, or for Damage. 6. Seising of Heriots, &c.

Of the second sort are, 1. Accord. 2. Arbitration.

There is also **REDRESS** by a mere **OPERATION** of law, which is, 1. Where a creditor is executor or administrator, and is thereupon allowed to *retain* his own debt. 2. In the case of *remitter*; where one, who has a good title to lands, &c. comes into possession by a **BAD** one, and is thereupon *remitted* to his antient good title, which protects his ill acquired possession.

Award is the judgment and arbitration of one or more persons, at the request of two parties at variance, for ending the matter in dispute, without public authority: and this is done by arbitrators chosen by the parties, on a bond to submit themselves to their judgment.

And arbitrators are generally where parties think it more safe to refer the matters in controversy to the determination of friends, than to venture a trial at law; they proceed at their own discretion, without solemnity of process, &c. to hear and determine the controversy referred to them: and they have as great power as other judges, though they are not tied to the formalities of law; and if they observe the submission, their award is definitive. *Dy. 356.*

The submission to arbitrators may be general, of all demands, &c. or special, of some matters in dispute: and the award must be made of the thing submitted, according to the submission; it must be equal between the parties, and not on one side only; and the performance of it is to be lawful and possible; also the award must be certain and final: if an award is of things not submitted, or to pay money to a stranger, &c. it will be void. *Co. Lit. 206. Rol. Abr. 242. 2 Saund. 122.*

Where arbitrators award a thing against law, it is void; so if more is awarded than should be: but on a general submission, the award may be of part, without the residue, and be good. An award may be void for some part, and good in another part, if it makes an end of all the differences submitted; and if the award is good in part, and void in part thereof, the good shall be performed. And the *Chancery* will not give relief against the award of arbitrators, unless for corruption, exceeding authority, &c. *Cro. Eliz. 161. Dav. Abr. 536. Rol. Abr. 244.*

If all debts and demands are submitted to arbitration, the arbitrators may award a release of bonds, specialties, &c. by which the debts and demands

demands are due: and where the award is according to the submission by bond, though it be void in law, if it is not performed, the obligation will be forfeited. Things relating to freeholds, leases, debts due on certain contract, matters concerning matrimony, and criminal offences, are not arbitrable by awards. *Danv.*

Abr. 513, 515.

10 Mod. 332.

Stra. 1.

2 *Stra.* 1024.

9 Mod. 232.

Sometimes matters are referred by the judges at the assizes to the three foremen of the jury, in nature of arbitrators; and after their award is made, the plaintiff may have an attachment, &c. to oblige performance: and attachment lies for not performing an award made a rule of court; after personal demand of performance. *Salk.* 83, 84. Submissions to awards, by agreement of the parties, may be made a rule of any of his majesty's courts of record; and on a rule of court thereupon, the parties shall be finally concluded by such arbitrament: and in case of disobedience thereto, the party refusing to perform the same shall be subject to the penalties of contemning a rule of court, &c. except it appears on oath, that such award was unduly procured, when it shall be set aside: but this extends only to personal matters, for which there is no other remedy but by personal action, or by suit in equity. *Stat.* 9 & 10 *W.* 3. c. 15.

When there is but one arbitrator, which happens where the matter is referred to two, and if they cannot agree in the award, it is left to a third person, this is called an *umpirage*; and the umpire has the same power as the arbitrators, if they do not agree in their award. Tho' the arbitrators are to refuse, and declare they will

will make no award, before the umpire shall proceed. 8 Rep. 98. 2 Saund. 130.

The umpire's award shall be good, where the arbitrators make a void award, which is no award. Lil. Abr. 170.

Award good, tho' made by umpire chosen by arbitrators before time, for making award, expired. Say. Rep. 222.

Award of costs good. Say. Rep. 240.

Award by umpire set aside, because right of nominating umpire was tossed up for by arbitrators. Say. Rep. 99.

Motion to set aside an award, must be made before the last day of the next term, after award published, otherwise too late, and attachment for non performance may issue. Cowp. Rep. 23.

Costs of arbitrament to abide event, mean such costs, as, according to event, would have been lost or gained upon verdict; and always so drawn, unless specially directed to contrary. Loffi's Rep. 391.

Submission to award, it's strength. Loffi's Rep. 426.

Cannot be affected after time limited by statute of W. 3. Loffi's Rep. 437.

Award not to be set aside, but for plain and gross mistakes. Loffi's Rep. 544.

Stat. 9 & 10 W. 3. c. 15. For determining differences by arbitration, is only declaratory of what the law was before, in putting submission, where no cause depending, upon same footing with those, where there was. 2 Burr. Rep. 701.

Awards are now considered with greater latitude, and less strictness than formerly; they are to be construed liberally and favourably,
and

Of Actions and Remedies.

and not scanned with nicety; they must be certain, consistent, sufficient, and mutual. *Burr. Rep.* 277, 278.

In action of debt on award, plaintiff needs shew nothing more than necessary to support his claim, and intitle him to his demand. *Burr. Rep.* 280.

But if action be brought upon the arbitration bond; in that case plaintiff must set forth the whole award. *Burr. Rep.* 281.

Award alledged to be made, after making of arbitration bond, and before exhibiting plaintiff's bill, to wit, on such a day, sufficiently positive. *3. Burr. Rep.* 1922.

If parties refer all matters in difference between them, arbitrator may dissolve partnership. *1 Bl. Rep.* 475.

Indorsement on award, unstamped, sufficient authority to third person to demand money awarded. *2 Bl. Rep.* 990.

On reference of all matters in difference in this cause, arbitrators awarded general releases, award held good, as to matters referred, but void as to rest. *2 Bl. Rep.* 1117.

Award that G. F. the defendant should pay plaintiff 298*l.* 9*s.* 9*d.* and give releases, on an arbitration bond, conditioned that if G. F. shall perform such award as shall be made between the plaintiff and J. F. &c. *1 Wils. Rep.* 28.

Award helped after verdict. *2 Wils. Rep.* 10.

Award may be good in part, and bad in part. *2 Wils. Rep.* 267, 293.

**Of Courts, Attornies and Solicitors,
Juries, Witnesses, Trials, Execu-
tions, &c.**

A Court is the place where justice is judicially administered: and there are many courts, some of record, and some not; courts superior, as those at *Westminster*, and courts inferior, in the country, &c. A court of record is that which hath power to hold plea according to the course of the common law, of real, personal and mixed actions, where the debt or damage is 40s. or above: and a court not of record is when it cannot hold plea of debt, &c. amounting to 40s. but of pleas under that sum; or where the proceedings are not according to the course of the common law, nor enrolled. *Crompt. Jurisd. Co. Lit.* 260, 117.

In courts where writs lie not, the suit is begun by plaint, viz. by entering the action, and cause of complaint, &c. and in inferior courts having particular jurisdictions, it must be set forth at large; for there nothing shall be intended to be within the jurisdiction, but what is expressly alledged to be so: but at the courts at *Westminster*, the plaintiff doth not shew at large in his declaration, that the cause of action arises within their jurisdiction, which is general; and pleading to issue, &c. allows the jurisdiction of courts. *Sid.* 331. 2 *Inst.* 229, 1. *Lit. Abr.* 371.

The courts of law and equity I shall here treat of, are the following,

1. The

Of Courts, Juries,

1. The high court of Chancery.
2. The King's Bench.
3. The court of Common Pleas.
4. The Exchequer.
5. The court of Assises, &c.

1. The *court of Chancery* is the highest court of judicature in this kingdom next to the parliament, and of very ancient institution. Its jurisdiction is of two kinds; ordinary or legal; and extraordinary, or absolute: The ordinary court is that wherein the lord chancellor in his proceedings and judgments, observes the order and method of the common law; and in such cases, the proceedings are filed or inrolled in the *Petty-Bag* office.

This court holds plea of recognizances acknowledged in *Chancery*; writs of *scire facias* for repeal of letters patent, writs of partition, &c. and also of all personal actions, by or against any officer of the court; and by acts of parliament, of several offences and causes: all original writs, commissions of bankrupts, charitable uses, of ideots and lunacy, &c. issue out of this court, for which it is always open; one from hence may have an *habeas corpus*, prohibition, &c. in the vacation, which are to be had out of the other courts only in term-time; and here a *subpoena* may be issued to force witnesses to appear in other courts, when they have no power to call them. But in prosecuting causes, if the parties descend to issue, this court cannot try it by jury; but the record is to be sent into the *King's Bench*, and try'd there, and afterwards remanded into the *Chancery*: though if there be
a de-

a demurrer in law, it shall be argued and adjudged here. Upon a judgment given in this court, a writ of error lies returnable in *B. R.* 4 *Inst.* 78, 80, &c. *Danv. Abr.* 776.

The extraordinary or unlimited court exercises jurisdiction in cases of equity, by way of *English* bill and answer in abating the rigour of the common law, and where the courts of law are defective to give remedy; it gives relief for and against infants, notwithstanding their minority; and for or against married women, called feme coverts, notwithstanding their coverture; all frauds and deceits are here relievable; as also all accidents to mortgagors, obligors, &c. against penalties and forfeitures, where the intention was to pay the debt; all breaches of trust, unreasonable engagements, &c. This court may force unreasonable creditors to compound debts; make executors, &c. give security, and pay interest for money long in their hands; and here executors may sue one another, or one executor alone be sued without the rest: order may be made for performance of a will; decree made who shall have the tuition of a child; and this court may relieve copyholders against the ill usage of their lords; confirm title to lands, where the deeds are lost; make conveyances, defective thro' fraud or mistake, good and perfect; oblige men to come to account with each other; avoid the bar of actions, by the statute of limitations, &c. 4 *Inst.* 84. *Rol. Abr.* 373. 1 *Danv.* 749, 750, 752, &c.

But in all cases, where the plaintiff can have his remedy at law, he ought not to be relieved in *Chancery*; and long leases, as for 1000 years; naked promises; verbal agreements not executed: estates derived under concealed titles, &c.

M

have

Of Courts, Juries,

have been refused relief in this court: and mortgages are not relievable in equity after twenty years, where no demand has been made, or interest paid, &c. Also this court will not retain a suit for any thing under 10*l.* value, except it be in cases of charity; nor for lands, &c. under 40*s.* *per annum*; and it refuses to relieve persons in suits where the substance of them tends to the overthrow of any fundamental point of the common law, or an act of parliament. *Danv. Abr.* 763, 754. 2 *Vent.* 340.

And altho' the power of the court of *Chancery*, in its equitable proceedings, is so great in the foregoing particulars, yet it is no court of record; and therefore 'tis said can bind the person only, and not the estate of the defendant; and if the party will not obey the decree of this court, he must be committed until he does: in this case, if there be an order that one shall stand committed to the *Fleet*, for breach of a decree, in pursuance of the order, there must be a writ awarded for taking and imprisoning him. 4 *Inst.* 84. *Danv.* 749. 776.

It is ordained by the *stat.* 36 *Ed.* 3. That whosoever shall find himself grieved with any statute, he shall have his remedy in the *Chancery*. No *subpœna* or process is to issue out of this court till a bill is filed; except in injunctions to stay waste, and suits at law, &c. and on a plaintiff's dismissing his bill, of the defendant for want of prosecution, the plaintiff to pay full costs, &c. 5 *Ann.* c. 16. A defendant not appearing on *subpœna* issued, and absconding to avoid being served therewith, the court may make an order for his appearance at a certain day, which shall be published in the *gazette*; and if he do not then appear, the plaintiff's bill shall

shall be taken *pro confesso*, and the defendant's estate sequestered to satisfy the plaintiff, &c. 5 Geo. 2. cap. 25.

2. The Court of King's Bench at Westminster, is a court that hath supreme authority, the king himself being supposed to be there, and was sometimes wont to sit in his own person. This court and the Chancery are to follow the king; and the King's Bench was originally the only court in Westminster-hall; out of which the courts of Common Pleas and Exchequer, seem to have been derived. 4 Inst. 73. 2 Hawk. P. C. 6.

It is divided into a crown-side, and a plea-side; the one determining criminal, and the other civil causes: the crown-side takes notice of all treasons, felonies, breaches of the peace, and of all causes prosecuted by way of indictment, or information; and into this office, indictments from all inferior courts, orders of sessions, &c. may be removed by *certiorari*: also here inquisitions of murder are certified: and hence issue attachments, &c. On the plea-side, it hath cognizance of all pleas by bill for debt, account, covenant, in action upon the case, and other personal actions, ejectments, &c. against any person in custody of the marshal, as every one sued here is supposed to be; and in all personal actions, for or against any officer, minister, or clerk of the court, who in respect to their attendance have privilege of court. Cramp. Juris. 67, 68. 4 Rep. 57. 9 Rep. 118.

In ancient times this court was ordinarily exercised only in criminal matters, and pleas of the crown: and it awards execution against persons attainted or condemned by parliament, or any other court, when the record is removed, and

Of Courts, Juries,

their persons brought thither by *habeas corpus*; and there pardons of offenders are allowed, on removing the records and prisoners, &c. This court may bail any person whatsoever; grants *habeas corpus's* to relieve persons wrongfully imprisoned; restores freemen unjustly disfranchised; and grants prohibitions to keep other courts within their proper jurisdictions, &c. 4 *Inst.* 70. 2 *Danv. Abr.* 279.

The court of *B. R.* regulates all the courts of law in the kingdom, so that they do not exceed their jurisdictions, nor alter their forms, &c. and may grant an attachment against any inferior court, usurping a jurisdiction not belonging to it; but generally a writ of prohibition is first issued to such court. The judges of this court are the sovereign justices and coroners of the land: and their jurisdiction is general over all *England*, which, when the king hath appointed them, they have from the law. 4 *Inst.* 74.

Court of *King's Bench* has power to remove every conviction by *certiorari*, unless where authority is taken away by statute. *Dougl. Rep.* 549.

King's Bench cannot bail for contempt of house of commons. *Wils. Rep.* 299.

Before stat. 4 & 5 *W. & M. chap.* 21. no declaration in *B. R.* against defendant in custody of sheriff. *Wils. Rep.* 120.

For jurisdiction of *K. B.* in *Wales*. See *Wils. Rep.*

3. The court of *Common Pleas* is one of the king's courts held in *Westminster-hall*, or other certain place: it is not to follow the king and his court, but to be held at some place certain; nor shall be removed without warning by adjournment. *Stat.* 9 *H.* 3. c. 12. & 2 *Ed.* 3. c. 11. All

All actions belonging to this court come here either by original, as on arrests and outlawries; or by privilege or attachment, for or against privileged persons; or out of inferior courts not of record: and all civil causes, real, personal, or mixed, are here brought and determined; tho' regularly this court cannot hold plea in any action real or personal, &c. but by writ out of *Chancery*, returnable here; unless it be by bill for or against an officer, or other privileged person of the court. 4 *Inst.* 99, 100.

The *Common Pleas* is said to have been the only court for real causes concerning lands; and in personal and mixed actions, it hath a concurrent jurisdiction with the *King's Bench*: but it hath no cognizance of pleas of the crown; and *Common Pleas* are all pleas that are not such. It's jurisdiction, like that of the other courts at *Westminster*, is general, and extends throughout *England*: and hither suits are removed out of other courts by divers writs; as by *pone, recordare*, writ of false judgment, &c. 4 *Inst.* 118. *Fortescue* 30, 51.

And this court, besides having jurisdiction for punishment of it's officers and ministers, may grant prohibitions to keep temporal and ecclesiastical courts within due bounds. *Ibid.*

4. The court of *Exchequer* is a very ancient court of record, set up to order and determine the rights and revenues, debts and duties due to the crown, &c. And in the *Exchequer* there are divers courts, consisting of many branches; but according to the usual division, it is divided into two parts only, for dispatch of business. 4 *Inst.* 112, 115.

This is the last of the four courts at *Westminster*; and the lord chief baron and barons are the

sovereign auditors of *England*, and hear and determine all causes in law or equity: for the judicial part of the *Exchequer* is a court both of law and equity; the court of law being in the office of *Pleas*, after the course of the common law, *coram baronibus*; and the court of equity held in the *Exchequer-chamber*, before the lord treasurer, chancellor or under-treasurer, and barons: but generally before the barons only, the lord chief baron being the chief judge. 4 *Inst.* 118.

Here the proceedings are according to the practice of the *Chancery*, by bill and answer; but the plaintiff must set forth in his bill, that he is debtor or accountant to the king, though whether it be so or not, is not material: in this court the clergy usually exhibit their bills for recovery of tithes; and here the attorney general brings bills against persons for any matters concerning the king; also any person grieved with any prosecution on behalf of the king, &c. may bring his bill against the attorney general, and be relieved therein. *Ibid.*

In the court of law, all the officers, and clerks, the king's tenants and farmers, all debtors, and accountants of the *Exchequer*, are privileged to sue and implead one another, or any stranger, in like manner as in the *Kings Bench* and *Common Pleas*; and the writs of *subpœna*, and *quo minus* go into *Wales*, where no process of the courts of *B. R.* or *C. B.* ought to run except the *capias utlagatum*.

There is a court of *Exchequer-chamber*, being the assembly of all the judges of *England*, for difficult matters in law; into which causes are adjourned when there are two judges against two,

two, that they cannot be determined in other courts, &c.

5. The *court of Assises* is the court, place or time, when and where the writs and processes of assise are handled or taken, before an assembly of knights, and other gentlemen, with the justice appointed, &c. And assise is general, as when the justices go their several circuits with commission to take all assises; or special where a special commission is granted to certain persons, (formerly oftentimes done) for taking an assise upon one or two disseisins only; and concerning the general assise, all the counties of *England* are divided into six circuits, and two judges assigned by the king's commission to every circuit, who hold their assises twice a year in every county, (except *Middlesex*, where the king's courts of record do sit, and where his courts for his counties palatine are held,) and have five several commissions:

1. A commission of *Oyer and Terminer*, directed to them and many other gentlemen of the county, by which they are impowered to try treasons, felonies, &c. 2. Of *Gaol-delivery*, directed to the judges and clerk of assise associate, which gives them power to try every prisoner in the gaol committed for any offence whatsoever; but none but prisoners in the gaol. 3. Of *Assise*, directed to themselves only and the clerk of assise, to take assises, and do right upon writs of assise brought before them by such as are wrongfully thrust out of their lands and possessions, &c. 4. Of *nisi prius*, directed to the judges and clerk of assise, by which civil causes grown to issue in the courts above are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return

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of the verdict of the jury to the court above, the judges there give judgment. 5. A commission *of the peace*, in every county of the circuits; and all justices of peace of the county are bound to be present at the assises; and sheriffs, &c. shall also give their attendance on the judges, or they shall be fined. 4 *Inst.* 158. *Bacon's Elem.* 15, 16, &c.

Justices of assise, &c. are to hold their sessions in the chief towns of each county; and their records shall be sent into the *Exchequer*: and if causes are too difficult for them, they shall be referred to the justices of the bench, there to be ended. *Stat.* 9 *H.* 3. c. 12. 6 *R.* 2. & 9 *Ed.* 3.

The inferior courts in the country may be reduced to the heads of,

1. The County-Court.
2. The Court-Leet.
3. The Court-Baron.

1. The *County-Court* is a court kept by the sheriff of every county, and divided into two sorts; one retaining the general name, as the county-court held every month, before the sheriff or his deputy: the other called the turn, held twice in every year, viz. within a month after *Easter* and *Michaelmas*. *Crompt. Jurisd.* 241.

By the Common law, every sheriff ought to make his turn or circuit throughout all the hundreds in his county, in order to hold a court in every hundred for the redressing of common grievances, and preservation of the peace, &c. and the turn is the king's leet thro' all the county; it being a court of record, of which the sheriff is judge: also before the courts at *Westminster*

minster were erected, the county-courts were the chief courts of the kingdom. *Glanvil*, lib. 1. cap. 2, 3. *Fleta*, lib. 2. c. 62.

But the power of the county-court was much reduced by the statute of *Magna Charta*, c. 17. and 1 *Ed.* 4. c. 1. It hath now the determination of certain trespasses and debts under 40s. and this court holdeth no plea of any debt or damage to the value of 40s. or more; nor of trespass *vi & armis*, &c. But of debt and other actions personal above that sum, the sheriff may hold plea by force of a writ of *justicies*, which is in nature of a commission to him to do it. *Brit.* c. 27 & 28. 4 *Inst.* 266.

No sheriff is to enter in the county court any plaint in the absence of the plaintiff; nor above one plaint for one cause, on pain of 40s. and the defendant in this court shall have lawful summons, &c. And out of the county-court causes are removed by *recordare*, *pone*, &c. into *K. B.* and *C. P.*

2. The *Court-leet* is a court of record incident to a hundred, ordained for punishing offences against the crown; it is derived out of the sheriff's turn, and inquires of all offences under treason; but those, which are to be punished with loss of life or member, are only inquirable and presentable there; and must be certified over to the justices of assise. 4 *Inst.* 261. *Stat.* 1 *Ed.* 3.

And this court is called the *view of frank-pledge*, for that the king is to be there certified by the view of the steward, how many people are within every leet, and have an account of their good manners and government; and all persons above twelve years of age, which have remained there for a year and a day, may be sworn to be faithful

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faithful to the king, and the people are to be kept in peace, &c. Also every one, from the age of twelve to sixty years, that dwells within the leet, is obliged to do suit in this court; except peers, clergymen, &c. 4 *Inst.* 261, 263.

In the court-leet, or view of frank-pledge, formerly all persons were bound with sureties or pledges for their truth to the king: the steward is here the judge, as the sheriff is in the turn; and this court is to be kept twice a year, one time in a month after *Easter*, and the other within a month after *Michaelmas*, at a certain place within the precinct; and the steward hath power, to elect officers, as constables, tithingmen, &c. as well as punish offenders. The usual method of punishment in the leet is by fine and amercement, and a presentment here subjects the party to them; the former is assessed by the steward, and the latter by the jury; for both of which, the lord may have an action of debt, or take a distress. *Kitch.* 70. *Co. Lit.* 115. 6 *Rep.* 12. 2 *Inst.* 199.

This court inquires of and punishes misdemeanors, incroachments, nuisances, &c. purpures in lands or woods; or houses set up, or beat down, and other annoyances; bounds taken away; ways or waters turned, or stopped; of thieves, and hues and cries not pursued; of bloodshed, escapes, persons outlawed, money coiners, treasure found; assise of bread and ale, persons keeping alehouses without licence; false weights and measures, unlawful games, offences relating to the game; of tanners selling insufficient leather; forestallers and ingrossers of markets, &c. of victuallers and labourers, unlawful fishing, idle persons, &c. All which particular articles

articles are to be inquired into by statute.
18 Ed. 2. 14 & 15 H. 8. 2 & 3 Ed. 6. 31
Eliz.

And the lord of the leet ought to have a pillory and tumbrel, &c. to punish offenders; or for want thereof he may be fined, or the liberty seised; and all towns within the leet are to have stocks in repair; and the town that hath none, shall forfeit 5 l. 2 Danv. Abr. 289.

Stat. 3 Geo. 3. chap. 2. concerning the assise of bread, has no saying of the jurisdiction of the leet; because it was providing for cases, where the leet had no jurisdiction. 3 Burr. Rep. 1863.

For original of leet. See Wilf. Rep. 251.

3. The Court-Baron is that court which every lord of a manor, (who in ancient times were called barons,) hath within his own precinct; and a court-baron is an inseparable incident to a manor; it must be held by prescription, for it cannot be created at this day, and is to be kept on some part of the manor. Co. Lit. 58.
4 Inst. 268.

This court is of two natures, 1. By the Common law, which is the barons or freeholders court, of which the freeholders being suitors are the judges. 2. By custom which is called the customary court, and concerns the customary tenants and copyholders, whereof the lord or his steward is judge: the court-baron may be of this double nature, or one may be without the other. The freeholders court hath jurisdiction for trying actions of debt, trespass, &c. under 40s. and may be held every three weeks; being something like the county-court: but on recovery in debt, they have not power to make execution, only to distrain the defendant's goods,
and

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and retain them till satisfaction is made. The other court-baron, is for taking and passing of estates, surrenders, admittances, &c. and is kept but once or twice in a year, (usually with the court-leet) unless it be on purpose to grant an estate, and then it may be holden as often as required. 4 Rep. 26. 6 Rep. 12. 2 Inst. 119.

In this court the homage jury are to inquire that the lords do not lose their services, duties, or customs; but that the tenants make their suits of court; pay their rent, heriots, &c. and keep lands and tenements in repair, &c. and every public trespass may be punished here by amercement, on presenting the same. Stat. 4 Ed. 1.

No steward of a leet, or court-baron, shall receive profits to his own use, that belong to the lord, on pain of 40*l.* and disability. 1 Jac. 1. c. 5.

Formerly, nothing was presumed in favour of the regularity of the proceedings of inferior courts, nor could they be set out with a *taliter processum*; but these objections have of late years been over-ruled. Cowp. Rep. 19.

If cause of action does not arise within jurisdiction, defendant must avail himself of it by plea in court below; or, if not alledged in plaint to be within jurisdiction, he must bring error or false judgment. Cowp. Rep. 20.

Stat. 21 Jac. chap. 23. sect. 6. made to prevent removal of suits, shall only extend to such as have an utter barrister for judge or deputy, and who shall be actually present at the trial. 1 Burr. 515.

Inferior courts may set aside regular interlocutory judgments, in order to let in trial of writs,

writs, but cannot set aside verdicts upon the merits, but only on the score of irregularity.

1 *Burr. Rep.* 571, 572.

In inferior court, declaration must alledge, that the money was had and received within the jurisdiction, as well as that defendant promised to pay within it. *Durnf. and East's Rep.* 151.

Declaration in bafe court, must alledge goods to have been fold and delivered, within the jurisdiction thereof, as well as that defendant promised within it. 2 *Wils. Rep.* 16.

Where inferior courts assume jurisdiction, they have not, action lies. 2 *Wils. Rep.* 382.

Next I shall mention *attornies* and *solicitors* in the courts of law, who are allowed, admitted and regulated,

1. By the orders of court and common law.
2. By ancient and late statutes.

1. Attornies at law are those persons as take upon them the business of other men, by whom they are retained: and in respect of the several courts, there are attornies at large; and attornies special, belonging to this or that court only. *Roll. Abr.* 17.

Attornies to enter their names and places of abode, or such other place, where he may be served with notice, such other place was meant in case they had not settled residence in London, and service at last place entered, good service. *Lofft's Rep.* 357. Rule Hil. term, 8 Geo. 3.

Action lies for a client against his attorney, if he appear for him without warrant; and if he pleads a plea, for which he hath not his warrant:

but

attys what?

to enter their names

an atty cannot appear without warrant

but in case the attorney appears without warrant, and judgment is had against his client, the judgment shall stand, if the attorney be responsible; otherwise if the attorney be not responsible. Action lies against an attorney for suffering judgment against his client by *nil dicit*, when he had given him a warrant to plead the general issue; though this is understood where it is done by covin. Action lies not for what an attorney does generally, although he knows the plaintiff has no cause of action; he only acting as a servant in way of his profession. *Dano. Abr.* 185. 4 *Inst.* 117. *Mod.* 209. *Salk.* 88.

action lies
for *nil dicit*

Att or Def
may not change
attorneys
if plea

Attorneys Fees

He, that is attorney at one time, is attorney at all times pending the plea: and the plaintiff or defendant may not change his attorney, while the suit is depending, without (1) leave of the court, which would reflect on the credit of attorneys; nor until the attorney's fees are paid; and attorneys and solicitors may detain writings which come to their hands by way of business, till their just fees are satisfied: if there be no fees due, the court will compel the delivery of them on motion, without forcing the party to an action. A cause shall proceed notwithstanding the death of an attorney therein, and not be delayed on that account. *Lil. Abr.* 148. 2 *Kob.* 273. *Say. Rep.* 21. *Dougl. Rep.* 217.

Attorneys must put
in special
bail

Attorneys have the privilege to sue and be sued only in the court at *Westminster*, where they practise: they are not obliged to put in special bail, they shall not be chosen into offices

(1) But new attorney may, without leave of court, sue out *Sci. Fa.* upon a judgment. *Say. Rep.* 218.

against

against their will, &c. *Ventr.* 299. *Ld. Raym.*

342, 533. 2 *Stra.* 1141.

2. Attornies, solicitors, &c. are to take the oaths to the government, under penalties and disabilities to practise. An attorney shall not be allowed any fees laid out for counsel, or otherwise, unless he have tickets thereof signed by them who received such fees; if they delay their clients suits for gain, the clients shall recover costs and treble damages against them; and the practiser shall be for ever after disabled to be an attornies, &c. 3 *Jac. c.* 7. 13 *W. 3. c.* 6.

not allowed fees for counsel unless they have tickets

Attornies are to enter and file warrants of attornies, (on half-crown stamp, see statute 25 *Geo. 3. chap.* 80.) in every suit, on pain of 10*l.* and imprisonment: and the plaintiff's attorney is to file his warrant (on the like stamp) the term he declares, and the defendant his the term he appears. If any who hath been convicted of forgery, perjury, or common barrettry, shall practise as an attorney or solicitor in any suit or action brought in any court; on complaint, the judge, where such action shall be depending, hath power to transport the offender for seven years, by such ways and under such penalties as felons. 4 *Ann. c.* 16. 12 *Geo. c.* 29. perpetuated by 21 *Geo. 2. c.* 3. *Stra.* 633. *Moseley* 68. *Barnes's Notes, G. P.* 91. *Comb.* 348. *Salk.* 89. 2 *Stra.* 1036. *Andr.* 276.

in a Warrant convicted of forgery perjury or common barrettry, can not practise

All attornies and solicitors shall be sworn, admitted and inrolled by the judges, before allowed to sue out writs in the courts at *Westminster*, &c. and every writ served on a defendant, shall be indorsed with the name of the attorney by whom sued forth; and sworn attornies permitting others to sue forth writs in their names to for-

forfeit 20*l.* to be disabled: for the future no persons shall practise but such as have served a clerkship of five years to an attorney, &c. duly sworn and admitted; and shall be examined, sworn and admitted in open court; and attorneys shall not have more than two clerks at one time, &c. persons sworn as attorneys, may be admitted solicitors in courts of equity: and if attorneys or solicitors demand by their bills, more than their due fees and disbursements, the clients shall recover costs and treble damages against them; and they shall not bring any action for fees till a month after delivery of their bills subscribed with their hands; also the parties chargeable may get them taxed in the mean time, and upon the taxation the sum remaining due is to be paid in full of the said bills; or in default the party shall be liable to attachment, &c. but if any bill is reduced a sixth part, the attorney must pay the costs of taxation. 3 *Yar.* 1. c. 7. 2 *Geo.* 2. c. 23. perpetuated by 30 *Geo.* 2. c. 19. *sect.* 75.

The judges of any court of record, may not admit any greater number of attorneys, than by the usages of such court hath been accustomed: and if any person shall sue out any writ, or defend an action in any courts of law or equity, as an attorney or solicitor, for any gain or fee; without being admitted and inrolled, he shall forfeit 50*l.* and be incapable to maintain an action for fee or reward; the penalty to be recovered by action of debt, bill, plaint, &c. 2 *Geo.* 2. c. 23.

Attachment may be awarded against an attorney, for neglecting his client's cause. *Say. Rep.* 51.

It is the duty of an attorney, to proceed in a suit commenced upon the credit of a client, altho' the client neglect to bring him money. *Say. Rep. 173.*

Attorney answerable to his client for exceeding his power, *Say. Rep. 259.* for an injury sustained by his neglect, *Say. Rep. 51, 172,* or by his misbehaviour. *Say. Rep. 169.*

Attorney bound, upon payment of what is due from a client, to re-deliver a deed to the client. *Say. Rep. 125.*

Attorney's bill of costs for conveyancing, may be taxed. *Say. Rep. 233. Dougl. Rep. 199. n. contra.*

Attorney is not obliged to pay for the plea, in a cause wherein he is plaintiff. *Say. Rep. 77.*

Venue cannot be charged, upon common affidavit, in a cause wherein attorney of court is plaintiff. *Say. Rep. 153, 180.*

Client bound by act of attorney, but he is answerable for an improper act, if injurious to client. *Say. Rep. 259.*

A felon attorney, tho' suffered his sentence, may notwithstanding be struck off the roll. *Cowp. Rep. 829.*

Attorney not privileged from giving evidence of collateral facts. *Cowp. Rep. 846.*

Attorney may be obliged to prove his client having sworn and refused an answer, upon which, latter is indicted of perjury. *Cowp. Rep. 846.*

Attorney has lien on client's deeds, papers, or money, for his bill. *Dougl. Rep. 104, 105, 238.*

Attorney, nor defendant's attorney's clerk, cannot be bail. *Dougl. Rep. 466, 467. n.*

Of Courts, Turfes,

Attorney cannot be lessee in ejectment. *Doug.*
Rep. 466. n.

Attorney not compellable to serve as a constable. *Dougl. Rep.* 538.

Payment to attorney, payment to principal.
Dougl. Rep. 624.

Attorney not to be held to bail in civil actions. *Lofft's Rep.* 149.

Service on attorney's agent, service on him, when absent. *Lofft's Rep.* 247.

Attorney ought to keep books of account
to prove the charges in his bill. *Left's Rep.*
329.

Action not to be brought on his bill till
month after delivery. *Loffi's Rep.* 341.

Attorney of B. R. having by mere collusion, with intent to secure the business arising from the prisoners, taken one of the turnkeys of the *King's Bench* prison, for his article clerk, articles cancelled and kept in court. 1 *Burr. Rep.* 291.

Attorney has no privilege against the court
of Conscience in *London*. 3 Burr. Rep. 1482.

He is not obliged to obey a *sp. duces tecum* of papers belonging to his client, in order to give evidence to a grand jury, to prove his client guilty of the forgery of them. 3 Burr. Rep. 1689.

An attorney fined 500*l.* for taking 200*l.* of a person charged with forgery, to let him out of the custody of the tipstaff. 1 *Wils. Rep.* 22.

Attorney discharged upon common bail, of course. 1 Wils. Rep. 298.

Attorney of C. B. arrested by lat. must plead his privilege. 1 *Wils. Rep.* 306. 2 *Bl. Rep.* 3085.

If attorney of *B. R.* do any thing wrong, as an attorney, in an inferior court, *B. R.* will compel him to answer complaint. *2 Wils. Rep. 382.*

If *A.* be indebted to *B.* and pay such debt to the attorney of a person suing *A.* in *B.*'s name, but without his authority; *A.* is notwithstanding obliged to pay *B.* over again; and *A.*'s remedy is against the attorney, tho' such attorney conceived he was acting under the real authority of *B.* *Durf. and East's Rep. 62.*

Attorney's undertaking to appear is not void. *Durnf. and East's Rep. 418.*

Payment to attorney, tho' changed without leave of court, good. *Bl. Rep. 8.*

Attorney struck off roll, may be re-admitted. *Bl. Rep. 222.*

Articled clerk, may, at leisure hours, employ himself in the business of another on his own account. *2 Bl. Rep. 764.*

Court will not compel an attorney in a summary way to make client satisfaction for a mistake, however fatal. *2 Bl. Rep. 780. Lofft's Rep. 618.*

Rule on attorney, deputy steward, to deliver up court books to his principal. *2 Bl. Rep. 912.*

Attorney admitted in *Common Pleas*, on special circumstances of his case, having served several masters, in all above five years, tho' not under regular articles. *1 Bl. Rep. 734, 957.*

Attorney fraudulently admitted, struck off roll, and attachment against master. *2 Bl. Rep. 991.*

21. Neglecting to charge defendant, being in custody, in execution, within two terms, by which omission defendant obtained his discharge, is liable to an action; but not to be proceeded against in a summary way. *2 Wilf. Rep. 325. 4 Burr. Rep. 2060, 2063.*

Practisers to take out annual certificates or licenses, on a five pound stamp, and a warrant on an half-crown stamp, in every cause; neglect, incurs the severest penalties. See *Rayn. Observation on stat. 25 Geo. 3. c. 80.* among stamp duty acts of parliament.

If both parties be attornies of the same court, privilege will be allowed; but not if attornies of different courts. *Bl. Rep. 19, 11, 1315.*

Attorney not taking advantage of being served as a common person, in reasonable time, will be considered as waiving his privilege, and will not be allowed it, especially if any intimation, that he will not. *Bl. Rep. 231.*

Attorney is privileged from serving corporation offices, though resident in corporation town. *4 Burr. Rep. 2109. Bl. Rep. 636, 637.*

Attachment of privilege quashed, no precipe being left when sued out. *2 Bl. Rep. 919.*

Attornies not privileged from serving in militia, or paying for substitutes in their stead. *2 Bl. Rep. 1123.*

Attorney has the privilege of laying venue in *Middlesex*, when plaintiff, and of having it changed into that county, if laid in any other, when defendant. *4 Burr. Rep. 2028.*

In order to trials in courts, after attornies and other practisers therein, I am to consider of,

Witnesses, Trials.

1. Juries, to try causes.
2. Witnesses and other evidence necessary.

1. *Jury* signifies a certain number of men, sworn to inquire of matter of fact, and declare the truth upon such evidence as shall be delivered them in a cause. And there are two sorts of juries in criminal cases; a *grand jury*, which usually consists of twenty-four men of greater quality than the other; and a *petty jury*, consists of twelve men, called the jury of life and death: the grand jury finds the bills of indictment against criminals; and the petty jury convicts them by verdict, in the giving whereof all the twelve must agree; and according to the verdict the judgment passeth. Also besides the common jury in civil cases; there is a *special jury*, in causes of consequence tried at the bar, when the court makes a rule for the secondary to name forty-eight freeholders, and each party to strike out twelve, one at a time, and the remainder to be the jury for the trial. A jury of *merchants* may be returned to try an issue between two merchants touching merchants affairs: and where an alien is plaintiff or defendant, the jury shall be half foreigners and half *English*, *per medietatem lingue*; but 'tis not necessary that the foreigners be all of the same country. *Co. Lit.* 154. 3 *Inst.* 30, 221. *Lil. Abr.* 125.

By the common law, jurymen are to be returned, in all cases, for trial of general issues, from the county where the fact was done; and they are to be freemen, indifferent, and not outlawed, or infamous; men attainted of any crime ought not to serve on juries, nor aliens

generally; and infants, persons seventy years old, clergymen, apothecaries, &c. are exempted by law from serving upon juries. By statute, jurors impanelled shall be the next neighbours, most sufficient and least suspicious; or the officer shall forfeit double damages: and their qualification, which was formerly but 40*s.* *per annum* estate, is 10*l.* *per annum* freehold or copyhold, within the same county; and talesmen 5*l.* a year. *S. P. C.* 154. 3 *Inst.* 221, 2 *Inst.* 447. *Stat.* 13 *Ed.* 1. 4 & 5 *W. & M.* c. 24.

The constables of parishes at *Michaelmas* quarter-sessions yearly, are to return to the justices of peace there, lists of the names and places of abode of persons qualified to serve on juries, between the age of twenty-one and seventy, attested upon oath, on pain of forfeiting 5*l.* and the justices of peace shall order the clerk of the peace to deliver a duplicate of those lists to the sheriff, &c. from which they are to make their panels of jurors: but no sheriff, or bailiff, &c. shall return any person to serve on a jury, unless he hath been summoned six days before the day of appearance, &c. And if a trial is for any thing which concerns the sheriff or under-sheriff, the coroner is to return the jury: the process to bring in a jury in *B. R.* is a *distringas*, and in *C. B.* *venire fac.* and then *habeas corpora jurator* to bring in the jury. *Stat.* 4 & 5 *W. & M.* c. 24. 7 & 8 *W.* 3. c. 32. 3 *Ann.* c. 18. 2 *Lit. Abr.* 126.

Lists of jurors, qualified according to the acts of 4 & 5 *W. & M.* and 7 & 8 *W.* 3. shall be made and given in from the rates of each parish, and fixed on the doors of churches, &c. twenty days before the feast of *St. Michael*, that notice may

may be given of persons qualified omitted, or of persons inserted who are not so, &c. and the lists being set right by the justices of peace in quarter-sessions, duplicates are to be delivered to the sheriffs of counties, by the clerks of the peace; the names contained in which, with the additions of the persons, shall be entered alphabetically by the sheriffs in a book, and none others to serve on juries, &c. If any sheriff, or other officer, shall return other persons; or the clerk of assize record any appearance when the party did not appear, they shall be fined by the judges not exceeding 10*l.* nor less than 40*s.* The like penalty for sheriffs taking money to excuse persons from serving; and the judges may fine the sheriffs, &c. not above 5*l.* for returning jurors who have served two years before in any county, except of York, &c. In the county of *Middlesex*, no person shall be returned as a juror, that hath served two terms before. *Stat. 3 Geo. 2. c. 25. 4 Geo. 2. c. 7.*

On the return of writs of *venire facias*, sheriffs are to annex thereto a panel, or little piece of parchment, of the names of a competent number of jurors named in the lists, not less than 28, nor more than 72; (without direction of the judges) who shall be summoned to serve at the assize, &c. and the names of the persons impanelled shall be written in distinct pieces of paper, and delivered by the under-sheriff to the judge's marshal, and he is to cause them to be rolled up and put together in a box; and when any cause shall be brought on, some indifferent person shall in open court draw out twelve of the said papers of names, one after another, who, not being challenged, are to be the jury.

It has been held since this statute that a *tales circumstantibus* was allowable upon special juries, by Raymond, Ch. Just.
2 Kel. 77.
pl. 39.
2 Sess. Cas.
333. pl. 183.
3 Bac. Abr.
248.

to try the cause; but if any are challenged, or do not appear, then a further number is to be drawn till there be a full jury, &c. and their names after sworn shall be kept apart in some other box or glass, till they have given in their verdict; and then these names shall be rolled up again, and returned to the former box, to be kept with the other names, as long as any cause remains for trial: and if a cause comes on, before the jury in any other shall have given their verdict, the court shall order twelve of the residue of the papers to be drawn, &c. Jurors whose names shall be drawn, if they do not appear after three times called, upon oath made that they were lawfully summoned, shall forfeit not above 5*l.* nor under 40*s.* *Stat. 3 Geo. 2. c. 25.*

There can be no special juries granted in cases of treason or felony. 21 Vin. Abr. 301. Pl. 5.

In trials of issues on indictments, &c. and all actions whatsoever, the courts at *Westminster* may order a special jury to be struck, as on trial at bar, upon motion in behalf of the king, or of any plaintiff or defendant; and when ordered by rule of court in causes arising within any city, &c. the jury shall be taken out of lists or books of persons qualified, which are to be brought by the sheriffs, &c. before the proper officer, as the freeholders book is for causes arising in counties. Persons who have estates, held for 500 years, or ninety-nine years, or other term determinable on lives, &c. of the yearly value of 20*l.* are declared qualified to serve on juries, and to be inserted in the freeholders book, &c. And leaseholders on leases, where the rent amounts to 50*l.* a year, are liable to serve as jurors in the county of *Middlesex*: and sheriffs of any county or city shall not impanel persons on any jury for the trial of capital

pital offences, who would not be qualified to serve in civil causes. In *London*, jurors are to be house-keepers that have lands or goods of 100*l.* value, who may be examined on oath, &c. *Ibid.*

By stat. 6 *Geo.* 2. c. 37. the acts of 3 *Geo.* 2. c. 25. 4 *Geo.* 2. c. 7. for the regulation of juries, are made perpetual: and the justices of the session or assizes, for the counties palatine of *Chester*, *Lancaster*, and *Durham*, on motion in behalf of his majesty, or any prosecutor or defendant in any indictment or information, &c. may, if they think fit, order a jury to be struck before the officers of each court, in such manner as special juries in the courts at *Westminster*.

‘ The party who shall by virtue of 3 *Geo.* 2. chap. 25. or 6 *Geo.* 2. chap. 37. apply for a special jury, shall not only pay the fees for striking such jury, but shall pay all the expences occasioned by the trial of the cause by such special jury, and shall not have any other allowance for the same upon taxation of costs, than such party would be intitled unto, in case the cause had been tried by a common jury; unless the judge before whom the cause is tried, immediately after the trial certify, in open court under his hand upon the back of the record, that the same was a cause proper to be tried by a special jury.’ Stat. 24 *Geo.* 2. c. 18. sect. 1.

‘ No person who serves upon any jury appointed by authority of the said acts, shall take for serving on such jury more than the sum which the judge who tries the issue thinks reasonable, not exceeding one pound one shilling,

shilling, except in causes wherein a view is directed.' *Ibid. sect. 2.*

To prevent delays where a peer is party by challenges to the array for want of a knight being returned on the panel, no challenge shall be taken to any panel of jurors, for want of a knight being returned in such panel, nor any array quashed by reason of any such challenge.' *Ibid. sect. 4.*

Every person duly impanelled and summoned to serve upon any jury for the trial of any cause to be tried in any court of record within the city of London, or in any other city or town corporate, liberties or franchises within England, who shall not appear and serve on such jury (after being called three times, and on proof on oath of the person so making default, having been duly summoned) shall forfeit for every such default, such fine not exceeding 40s. nor less than 20s. as the judge of the respective courts wherein such default is made shall impose, unless some just cause for such defaulter's absence be made appear by oath or affidavit to the satisfaction of the judge. 29 Geo. 2. chap. 19. sect. 1.

The plaintiff or defendant in a cause may use their endeavours for a jurymen to appear, but not one who is no party to the suit. If a juror appears, and refuseth to be sworn, or to give any verdict: and if he endeavours to impose upon the court, or is guilty of any misbehaviour after departed from the bar, he may be fined, and attachment issue against him: and if a jurymen withdraw from his fellows, or keep them from giving their verdict, without alledging any reasons for it, he shall be fined; not

not if he differ from them in judgment. *Moor*
 882. *Dy.* 53.

Jurors are not to meddle with any matters which are not in issue; they are fineable if unlawfully dealt with to give their verdict; tho' they are not fineable for giving a verdict contrary to the evidence, or against the direction of the court; for the law supposes the jury may have some other evidence than what was given in court; and they may not only find things of their own knowledge, but they go according to their consciences: but in a civil cause, an attaint will lie against them, if they give a false or corrupt verdict. *3 Leon.* 147. *Vaugh.* 144, 149, 153.

If the jury take upon them the knowledge of the law, and give a general verdict, it is good; but in cases of difficulty they may find the special matter, and leave it to the judges to determine what law is upon the fact. And after the evidence is given, the jury are to be kept together till they bring in their verdict, without meat, drink, fire or candle, otherwise than with leave of the court; and the court may not give them leave to eat or drink, out of court: if jurors after sworn eat or drink, tho' the verdict be good, they are fineable; and if it be at the charge of either party, the verdict is void. When a juror is sworn, he may not go from the bar until the evidence is given, for any cause whatsoever, without leave of the court, and having a keeper with him: and when the jury are gone from the bar, a witness may not be called by them to repeat the same evidence he gave in court. *Ca. Lit.* 227. *Dalif.* 10. *Cro. Jac.* 21. *2 Lil. Abr.* 123, 127.

In

Of Courts, Juries,

In capital cases a verdict must be actually given by jurors; and if the jury do not agree upon it, they may be carried round the circuits, and shall not be discharged till they do: in civil cases it is otherwise, as where there are non-suits, &c. and oftentimes in a civil case, when the evidence hath been heard, the parties doubting of the verdict do consent that the jury shall be drawn or discharged. Jurors by the common law are liable to no prosecution for giving their verdict except by way of attain; in which case being found guilty, they are punishable by loss of lands and goods, their houses to be rased, and their bodies cast into prison; and the party is to be restored to all that he lost by their false verdict; but this is altered by the statute 23 H. 8. c. 3. *Co. Lit.* 227, 154. 2 *Hawk. P. C.* 147.

If a juror takes any thing of either party, to give his verdict; he shall pay ten times as much as taken; or suffer a year's imprisonment; and a juryman guilty of bribery is disabled to be of any assises or juries, and to be imprisoned and ransomed at the king's will; also being accused of this, may be tried presently by a jury then taken. But jurymen, where there is a full jury, and they try the cause, are to have their charges allowed them. *Stat.* 38 E. 3. c. 12. 5 *Ed.* 3. and 34 *Ed.* 3. 2 *Lil. Abr.* 125.

The challenge of jurors is in respect of partiality, or default of the sheriff, by reason of kindred, &c. to the plaintiff or defendant; or where one of the parties is of affinity to any juror; a juror hath given a verdict before in the same cause, or if he hath been an arbitrator therein, &c. And jurors may be challenged for defect of age, or want of estate; and being

ing convicted of felony, perjury, &c. *Plowd.* 425. *Hob.* 294. 2 *Rol. Abr.* 636, &c. *Ca. Lii.* 172.

Persons on panel for special jury, ought to be summoned a sufficient time before the trial.

Say. Rep. 30.

Only twelve persons ought to be returned for trial in inferior court, but if twenty-four be returned it is not error. *Say. Rep.* 256.

Judgment upon writ of inquiry set aside, because the jury were returned by plaintiff's attorney. *Cowp. Rep.* 112.

With regard to striking out twenty-four from special jury. *Cowp. Rep.* 412.

If inhabitants of district have enjoyed prescriptive exemption from serving on juries, they are not liable to serve on any of the statutes relative to juries. *Dougl. Rep.* 188.

Jurymen above eighty years of age, discharged by the court. *Loffe's Rep.* 213, 214.

Special jurors fined for neglecting to attend trial at bar. 1 *Burr. Rep.* 274.

Jurors are the strict and proper judges of cases depending intirely on circumstances.

1 *Burr. Rep.* 609.

Trials by jury in civil cases, could not now subsist, without a power *somewhere* to grant new trials. 1 *Burr. Rep.* 393.

Affidavit of juror, that jury having been divided, tested up, and that plaintiff had even rejected. *Durnf. and East's Rep.* 11.

It must appear on record, that the trial was had by twelve jurors. 2 *Bl. Rep.* 718.

Confession of jurymen, subsequent to verdict, of misconduct, no ground for new trial. 2 *Bl. Rep.* 803, 1299.

2. A

2. A witness is one that proves and makes out any thing to a jury on a trial, by lawful testimony; and ought to be an indifferent person to each party, and not concerned in the cause: and evidence is used for some proof by men on oath, or by writings or records; it is called evidence, as thereby the point in issue is made evident to the jury. *Co. Lit.* 283.

As to persons who may or may not be witnesses: an alien,* infidel, (not a Jew who may be sworn on the Old Testament) a person of *non sane memory*, one interested in the suit, a † wife, for or against her husband, (except in cases of treason) persons convicted of felony, or perjury, &c. may not be witnesses in a cause: but kinsmen, though never so near, tenants, servants, masters, attorneys for their clients, and all others that are not infamous, which want nor understanding, or are not parties in interest, may be witnesses: though the credit of servants is left to the jury. A judge who is to try the person, may give testimony, going off from the bench; and a juror may be a witness, as to his particular knowledge; but then it must be on examination in open court, not before his brother jurors. Members of corporations will not be generally admitted to be witnesses in a cause that concerns the corporation: tho' inhabitants that are not freemen will be allowed: ‡ a counsellor, attorney or solicitor, is not to be examined as a witness against their clients, be-

* 2 Eq. Cas. Abr. 397. pl. 15. 2 Stra. 1104. *from contrary.*

† Wife's declaration where evidence against her husband. *Stra.* 527.

‡ See this subject fully discussed in *R. yn.* Read on stat. 2 Geo. 2. chap. 23. quarto.

ing obliged to keep their secrets; but of their own knowledge before retained, not as counsel, attorney, &c. they may be examined. *Co. Lit.* 6. 4 *Inst* 279. 2 *Rol. Abr.* 685. 2 *Hawk.* 432. 2 *Lev.* 231. *Ventr.* 197. 2 *Bac. Abr.* 286. &c.

In case divers persons are made parties, to a suit, and some found not guilty, &c. they may be witnesses in the cause. A man that hath a legacy given by will, is not a good witness to the will; but he may release his legacy, and then he shall be a witness: a person who claims any benefit by a deed, may not prove that deed, in regard of his interest; and one any ways concerned in the same title of land in question, will not be permitted to be a witness in the suit depending. But in criminal cases, as of robbery on the highway, in action against the hundred; in rapes of women, or where a woman is married by force, &c. a man or woman may be witness in their own cause; so in private notorious cheats, where no persons else can be witnesses, but those who suffer. 2 *Lil. Abr.* 704. 705. 2 *Rol.* 625. *Ventr.* 243. *Salk.* 286. 2 *Ld. Raym.* 1179.

If one by judgment hath stood in the pillory, or being whipt; for this infamy he shall not be allowed to give evidence, whilst the judgment is in force: but the record of conviction must be produced; and you may not ask the witness any question to accuse himself, though his credit and character in general, may be impeached by other witnesses, so as not to make proof of particular crimes whereof he hath not been convicted. Although judgment of the pillory infers infamy at common law; by the civil and canon law it is no infamy, unless the cause
for

for which the person was convicted was infamous: and it hath been adjudged, that 'tis not standing in the pillory, disables a person to give evidence; but the standing there upon a judgment for some infamous crime, as forgery, &c. If for a libel, a man may be a witness; and so in other cases, when he is pardoned. 3 *Inst.* 219. 3 *Lev.* 426, 427. 5 *Mod.* 16, 74. 3 *Nelf. Abr.* 557.

The testimony of one single witness to a jury is sufficient; and one witness is enough for the king in all causes, except for treason, where there must be two witnesses: for the common law required not a certain number of witnesses; but they are required by statute in some cases. And if a witness, served with process, refuse to appear and give evidence in a criminal cause, the court may put off the trial, and grant attachment against him: in a civil cause, if any witness refuse to appear, being tendered reasonable charges, and having no lawful excuse, action of the case may be brought, whereupon 10*l.* damages, and other recompence to the party, shall be recovered. And a feme covert not appearing, action lies against the husband and her. 3 *Inst.* 26. *Leo.* 112. *Stat.* 5 *Eliz.* c. 9. perpetuated by 29 *Eliz.* c. 5. and 21 *Jac.* c. 28. s. 8.

Evidence by writings and records is where acts of parliament, statutes, judgments, fines and recoveries, proceedings of courts, and deeds, &c. are admitted as evidence in a cause.

General acts of parliament may be given in evidence, upon the statute book, and need not be

• *Stra.* 310. 2 *Stra.* 810. 2 *Ld. Raym.* 1528. *Barnard. K. B.* 45. 2 *Stra.* 1054.

plead-

pleaded; but where there is a private act, a copy of it must be examined by the records of parliament, and it ought to be pleaded: records and inrolments prove themselves; and a copy of a record sworn to may be allowed as evidence: the part indented of a fine is the usual evidence that there is such a fine; tho' it is said, the fine must be shewed, with the proclamations under seal. A record of an inferior court hath been rejected in evidence; and the party put to prove what was done: an ancient deed proves itself, possession having gone accordingly; but later deeds are to be proved by witnesses; and if they are dead, their hand-writing must be proved. Although a seal is broken off, a deed may be evidence; but it cannot be proved by a counterpart or copy, when the original is in being, and may be had; if it be burnt, &c. the judges may allow proof by witnesses, that there was such a deed, and this be given in evidence. *Co. Lit.* 117, 262. *10 Rep.* 92. *2 Rol. Abr.* 574. *2 Inst.* 118. *Lev.* 25.

A writing allowed to be read, to prove one part of an evidence, may be read to prove any other part of the evidence given to a jury, and if a copy is permitted, it must be the intire copy of the whole, that the court may judge of it. The probate of a will is admitted as evidence for personal estate; but if title of land is made under the will, it must be shewn, not a copy of it, or the probate. If the will is proved in *Chancery*, copies of the proceedings there will be evidence. Of things done in a foreign country, the testimony of a publick notary is good evidence. *Lil. Abr.* 548. *2 Rol.* 678. *6 Rep.* 57.

O

Depo-

Depositions of witnesses in *Chancery*, between the same parties, may be evidence at law, 2 *Bac. Abr.* 314. but in a court of Common law, a decree in *Chancery* is no evidence: the depositions before a coroner have been admitted as an evidence, the witnesses being dead; depositions in the ecclesiastical court cannot be given in evidence, tho' a sentence may in a cause of tithes, &c. church-books are not allowed as evidence; yet some say they may: a shop book is evidence, but not after a year for goods sold, &c. unless it be in buying and selling, between one tradesman and another. An almanack, wherein the father had writ the nativity of his son, was held evidence to prove his son's non-age; and an inscription on a grave-stone, hath been judged good to make a pedigree for the heir. *Trials per pais* 167, 207, 235. *Lev.* 180. 7 *Jac.* c. 12. *T. Raym.* 4. 5 *Mod.* 10.

Matter of fact shall be given in evidence at a trial; in debt, a release may be given in evidence, on *nil debet*; and entry and expulsion, in debt for rent, &c. On the general issue, fraud may be given in evidence: but many things are to be pleaded; and cannot be given in evidence, upon Not guilty. By statute, justices of peace, constables, &c. may plead the general issue, and yet give the special matter in evidence in their justification. *Vaugh.* 443, 147. 5 *Mod.* 18. *Trials per pais* 404. *Stat. Jac.* c. 5. (perpetuated by 21 *Jac.* c. 12.) 21 *Jac.* c. 12.

Exemplification of record of *Exchequer*, under seal of court, admissible evidence. *Say. Rep.* 298.

So is, that part of consideration money mentioned in conveyance, was not received for land conveyed. *Say. Rep.* 210.

So

So may that, which is contradictory to an allegation, under a *viz.* *Say. Rep.* 221.

Parol evidence inconsistent with written agreement not admissible. *Say. Rep.* 198.

Inhabitant of parish, not rated to poor, competent witness, in action for penalty, moiety whereof is to parish poor. *Say. Rep.* 180.

Person to whom money has been given to forbear to vote at a parliamentary election, competent witness. *Say. Rep.* 290.

Married woman admissible witness to prove, that a child born of her body, was begotten by a man not her husband; but she cannot be admitted to prove, that her husband had no access to her. *Say. Rep.* 62.

Copy of reversal of decree of court of Chancery, is sufficient evidence, without producing the minute book itself, nor need such copy to be upon stamps. *Cowp. Rep.* 17. See *Loss's Rep.* 387, 428, 429.

Parol evidence must be admitted to explain testator's intent in cancelling a will. *Cowp. Rep.* 53.

Bailiff's name indorsed on writ sufficient evidence, that he was authorized by sheriff to arrest, without proving warrant. *Cowp. Rep.* 66.

General declarations of parent, are good evidence after death, to prove, that a child was born before marriage but not to prove a child born in wedlock, a bastard. *Cowp. Rep.* 591.

So the answer of one of the parents to a bill in Chancery, is admissible to prove such birth. *Cowp. Rep.* 594.

So parents may be admitted to prove the fact of marriage, on a question concerning the legitimacy of the child. *Cowp. Rep. 593.*

But not to prove non access. *Cowp. Rep. 594.*

Tradition is evidence in questions of pedigree. *Cowp. Rep. 594.*

So are circumstances, that shew illegitimacy. *Cowp. Rep. 594.*

So an entry in a family bible, an inscription on a tombstone, or a pedigree hung up in a family mansion. *Cowp. Rep. 594.*

How far possession of twenty years, is evidence of a fee, and when it may be presumed. *Cowp. Rep. 595.*

Indecency of evidence is no objection to it's admissibility. *Cowp. Rep. 734.* unless it arise upon a wager concerning the sex of a third person. *Cowp. Rep. 736.*

Evidence that a custom exists in adjacent parishes, is not admissible, in a question upon the custom of tithing in a particular parish; but as to the general custom of the whole county, it is. *Cowp. Rep. 807.*

Servant who has embezzled master's property, if released, admissible witness against party receiving same, in action for monies had and received by master to recover amount. *Cowp. Rep. 199.*

Indorsement by proper officer, sufficient evidence of enrolment of bargain and sale. *Dougl. Rep. 57, 58.*

In debt or bond, if proved, that defendant admitted debt, and attendance of subscribing witness cannot be procured, it is sufficient to prove defendant's and witness's hand writing. *Dougl. Rep. 93.*

In such action acknowledgment of obligor, that he owed debts, does not supersede calling or accounting for absence of subscribing witnesses. *Dougl. Rep.* 216, 217.

Executor who takes no beneficial interest is competent witness to prove testator's sanity. *Dougl. Rep.* 139.

Bare trustee competent witness to prove execution of deed to himself. *Dougl. Rep.* 141.

No objection to executor's testimony, that he may be liable to actions, as executor *de son tort*. *Dougl. Rep.* 141.

One who acted in breach of an alledged custom, not competent to disprove custom. *Dougl. Rep.* 374, 375.

Evidence of custom in one manor, not admitted to prove custom of another. *Dougl. Rep.* 513.

Witness not bound to answer, whether he is a papist. *Dougl. Rep.* 593.

Acknowledgement of one drawer of joint and several promissory note, may be given in evidence on a separate action. *Dougl. Rep.* 652.

Writ of execution not evidence of judgment, except against parties to such judgment. *Dougl. Rep.* 41, 42.

Matter of inducement only may be given in evidence upon the general issue. *4 Burr. Rep.* 2469.

Infancy or release may be given in evidence. *Say. Rep.* 270.

Separate action, where it ought to be joint, cannot be given in evidence. *5 Burr. Rep.* 2613.

Justices of peace, constables, &c. may, upon being sued for official acts, give the special matter in evidence. *Dougl. Rep.* 303. *Loff's Rep.* 373.

Of Courts, Juries,

Parol evidence that bond was given in lieu of dower, refused. *1 Wils. Rep. 34.*

If substance of issue proved, sufficient. *Wils. Rep. 116.*

Survey of religious house, taken in 1363, good evidence to prove vicar's right to tithes. *Wils. Rep. 170.*

Parol evidence of common report to prove who was patron, where blank left in register of institution to church of patron's name, admitted. *Wils. Rep. 215.*

In debt upon bond conditioned for payment of money to a third person, who declares defendant owes nothing, such declaration properly given in evidence. *Wils. Rep. 257.*

Parol proof admitted, that testator intended his wife executrix should have residue undisposed of. *Wils. Rep. 313.*

The mere evidence of facts stated in case made for opinion of court, not sufficient. *2 Wils. Rep. 163.*

Debt upon award, *nil debet* pleaded, partiality in arbitrators cannot be given in evidence. *2 Wils. Rep. 148.*

Single admittance to copyhold, evidence to prove custom of manor. *3 Wils. Rep. 63.*

Promissory note of hand, need not be proved, on executing writ of inquiry. *3 Wils. 155. 2 Bl. Rep. 748.*

Parol evidence not admitted to contradict writing. *3 Wils. 275. 2 Bl. Rep. 1228.*

Every thing may be given in evidence, upon the issue being joined in a writ of right, except collateral warranty. *3 Wils. Rep. 420.*

Parol evidence to will, may be encountered by parol evidence. *Bl. Rep. 60.*

Exemp-

Exemption from penal statute may be given in evidence upon general issue, in indictments. *Bl. Rep.* 230.

Confession of forgery, by dead witness, admissible evidence. *Bl. Rep.* 346.

Subscribing witness to will, swearing to testator's incapacity, contradicted by other evidence. *Bl. Rep.* 365.

Executor in trust, who has acted, may be a witness. *Bl. Rep.* 365.

Correspondent sufficient evidence to disprove man's hand, tho' he never saw him write. *Bl. Rep.* 384.

Evidence that party has not been heard of, for many years, evidence *prima facie*, to prove him dead without issue. *Bl. Rep.* 404.

Bond of thirty years standing, if no payment, cannot be read in evidence. *Bl. Rep.* 532.

In actions by third persons, for taking goods on *fi. fa.* against *J. S.* defendants, who justify, must give in evidence copy of judgment. 2 *Bl. Rep.* 701.

Members of parliament, moving to be discharged on privilege, must produce in evidence, return of writ of election. 2 *Bl. Rep.* 788.

Parsons need not prove their reading the articles. 2 *Bl. Rep.* 852.

If judgment be set out, it must be proved. 2 *Bl. Rep.* 1101.

Affidavit filed in court may be read, without proof of it's being sworn. 2 *Bl. Rep.* 1190.

The king's sign manual may be given in evidence, on indictment for returning from transportation. 2 *Bl. Rep.* 797.

See Witnesses.

Of Courts, Juries,

Form a writ of *subpœna* for witnesses to testify.

GEORGE the Third by the grace of God, king of Great Britain, &c. To T. F. M. H. and N. J. We command you, and every of you, firmly enjoining you, that laying aside all and all manner of businesses and excuses whatsoever, you and every of you be before our faithful and well beloved William Earl Mansfield, our chief justice appointed to hold pleas in our court before us, on the — day of, &c. next following, at Guildhall, London, &c. to testify all and singular those things, which you or either of you shall know, in a certain cause now depending and undetermined in our court before us, between A. B. plaintiff and C. D. defendant, in a plea of debt, &c. and on that day to be tried by a jury of the county; and this you and every of you are by no means to omit, under the penalty of one hundred pounds. Witness, &c.

If it be at the assizes, then it must be; that you and every of you be in your proper persons before our justices at the assizes appointed to be held in the county of W. on the — day of, &c. next following, at, &c. in the county aforesaid, to testify, &c.

A *subpœna* ticket for a witness to appear.

Mr. M. H.

BY virtue of a writ of *subpœna* to you and others directed, and herewith shewn unto you, you are personally to be and appear before William Earl Mansfield, chief justice, &c. Or before his majesty's justices of assize, on the — day of, &c. next, being, &c. at ten of the clock in the forenoon of

of the same day, at the court then to be holden at &c. in the county of W. to testify the truth, according to your knowledge, in a certain cause now depending, and then and there to be tried between A. B. plaintiff, and C. D. defendant, in a plea of, &c. on the part of the plaintiff; and hereof you are not to fail, on pain of one hundred pounds. Dated the — day of, &c. in the — year of the reign of the lord George, &c. and in the year of our Lord 17—.

Further recompence given by stat. 5 Eliz. chap. 9. sect. 12. against witness, for non-attendance, must be assessed by court, whereout the process issues; not by jury nor judges at *Nisi Prius*. *Dougl. Rep.* 556.

Action of debt will not lie on such assessment. *Dougl. Rep.* 561.

Witness who wilfully absents, may be attached for contempt; or an action on the case will lie. *Dougl. Rep.* 561.

Person not a competent witness to impeach a security, which he has given, though he be not interested in the event of the suit. *Durnf. and East's Rep.* 296.

Pagan infidel may be a witness. *Wilf. Rep.* 8. All three witnesses to a will of lands, must be examined, if living. *Wilf.* 216.

Father being freeman of borough, good witness to prove custom, whereby son intitled to freedom. *Wilf.* 332. *Say. Rep.* 46.

One convicted of petit larceny, and had judgment of whipping, cannot be a witness. *Wilf.* 18.

Factor good witness. 3 *Wilf.* 40.

Witnesses ought not to be admitted to deny their own attestation. 4 *Burr. Rep.* 2225.

On

Of Courts, Juries,

On a *qui tam* action on statute of usury, borrower of money holden to be competent to prove both usurious contract, and also that money was to be repaid. 4 *Burr. Rep.* 2251, &c.

Person liable to be contributory to defendant for damages recovered, incompetent witness for him. 5 *Burr. Rep.* 2729.

See Evidence.

The head *trial*, in pursuance of my present method, I shall divide into,

1. Things to be known preparatory thereto.
2. The form of trial in the courts at *Westminster*.
3. How trials are managed at the assizes.
4. New trials and executions, &c.

1. Trial, in its common definition, is the examination of a cause civil or criminal, before a judge, who has jurisdiction to try it according to the laws of the land. And the most general rule has been, that every trial shall be out of that town, precinct, &c. within which the matter of fact triable is alledged, or the nearest thereunto, for the better cognizance of the fact committed. *Co. Lit.* 125.

All trials for murder must be had in the county where the fact was done: but if the stroke is in one county, and the death in another, the indictment may be found by the jury of the county where the party died; and there the matter be tried as well as if the stroke had been in the same county: and when an indictment is found against a person in the proper county, it may be heard and determined in any other county by special commission, &c. In a civil case, if a foreign

reign issue which is local should happen, it may be tried where the action is laid; and for that purpose the plaintiff may enter a suggestion on the roll, that such a place in such a county is next adjacent; and it shall be tried in the court of B. R. by a jury from that place, according to the laws of that country, which may be given in evidence. 3 *Inst.* 27. *Cro. Car.* 247. 5 *Ed.* 6. 2 *Salk.* 651.

Where civil causes are grown to issue, if they are to be tried in *London* or *Middlesex*, and the defendant lives not forty miles from *London*, in that case eight days notice of trial must be given the defendant; and if he live that distance from *London*, or further off, he must have fourteen days notice from the plaintiff, before he try his cause. But at the *assizes* eight days notice of trial is good, let the defendant live where he will; and if the defendant go to trial without sufficient notice given him, the trial is not binding. A defendant on due notice given must go to trial, or judgment will pass against him by default: and where the plaintiff will not try his cause in such time as he ought to do, by the rules of the court: the defendant may give a rule and notice for trying the cause by *proviso*, and so discharge himself of the action. 2 *Lil.* *Abr.* 613. *Stat.* 23 *Hen.* 8. c. 15.

In case the court sees that one of the parties is surpris'd, through some casualty, without any fault of his own, they may at their discretion put off the trial to another time, until such party is better prepared: also if a defendant is not ready to try his cause, on petition, and affidavit of the reasons, the judge will order it to be stayed till another day the same *assizes*; and in *London* until the next term, on payment of costs. A
cause

cause is to be entered in the judge's book two days before the time of trial, or it shall not be set down to be try'd that term: and if the issue is not joined between the plaintiff and defendant, which consists of an affirmative on the one part and a denial of the charge on the other part, &c. it will not be a good trial. 2 Lil. Abr. 609.

2. To proceed to trial in the courts at *Westminster*, after the bill or writ issued and executed against the defendant, and appearance thereupon made by him, the declaration is to be drawn and delivered with an imparlance to the defendant's attorney; and it must be entered that term on the prothonotary's roll, and docketed: the term following the plaintiff's attorney gives a rule with the secondary for the defendant to plead by such a day, or the plaintiff to have judgment; and the defendant having pleaded to the plaintiff's action and declaration, according to the case, so that the parties are at issue, the attorney for the plaintiff makes a copy of the issue, and gives it to the defendant's attorney, with notice of trial; in order to which, the *venire facias* must be made out and returned by the sheriff, and after is sued forth the *habeas corpus* to bring in the jury, and the record is made up; whereupon a trial is had, and a verdict being brought in by the jury, judgment is given accordingly, &c.

But if the defendant do not plead, but lets it go by default, then upon entering judgment, a writ of inquiry of damages is to be awarded, returnable the next term, of the execution, whereof notice is to be given the defendant's attorney; which being executed, with the damages inserted in a schedule annexed to the writ, and returned

returned by the sheriff to the prothonotary's office, &c. and on a rule being given upon it, he taxes costs: then it is carried to the clerk of the judgments, and on giving him the number roll and term that the judgment was entered, he will make out a writ of execution, either a *cepias ad satisfaciendum* or *feri facias*, for the damages and costs.

Different issues in same cause, may be tried in different terms. *Say. Rep.* 130.

Upon the trial of such issues, at same time, evidence may be given separately, as to every issue. *Say. Rep.* 131.

Trial of cause put off, because attorney so ill as not to be able to attend. *Say. Rep.* 63.

Further time for trial of feigned issue refused, record having been withdrawn, without any reasonable cause. *Say. Rep.* 115.

When cause has been suspended after issue joined, for above a year, defendant intitled to term's notice of trial, unless stayed by injunction in court of C. B. as well as in K. B. *Dougl. Rep.* 71, 72, n.

Traitor arraigned twice and two juries sworn to try him. *Wilf.* 157. *Fost. Cr. Law*, 16, 23.

Trial after day of *nisi prius* is *coram non iudice*. *2 Wilf. Rep.* 144.

Trial in collateral issues, tho' in capital cases, shall not be put off, unless defendant makes oath of the truth of his plea. *4 Bl. Rep.* 512. See *Fost.* 40. *Wilf.* 150.

Where fair trial cannot be had in county where cause of action arises, trial will be ordered to be in next *English* county. *Durnf. and East's Rep.* 363.

Venue of trial, in criminal information, not to be, but upon evidence of strong partiality. *Bl. Rep.* 378. *3 Burr.* 1330.

Special

Of Courts, Judges,

Special case requisite to put off trial, where witnesses will be absent 18 months. 4 *Bl. Rep.* 36.

Quere, where murder to be tried, if stroke given at sea, and party dies in Ireland. *Bl. Rep.* 459.

Venue changed through apprehension of partial trial. *Bl. Rep.* 480. 3 *Burr.* 1564.

Where case suspicious, and the absent witnesses foreigners, never likely to return to England, trial not put off. *Bl. Rep.* 510. 3 *Burr.* 1513.

3. In the proceedings to trial at the *assizes*, when any cause comes on, a *disfringing* of the jury is to be first returned by the sheriff, and then the record must be delivered to the judge's marshal; upon which, the counsel being instructed with their briefs, &c. and all parties ready, the marshal gives the record to the judge, and the cryer calls over the names of the jury, and when they are sworn, being first elected by ballot, they are bid to stand together, and hear their charge; which done, the counsel on both sides open the case, first of the side of the plaintiff, as the proof lies on him, and looking over their *Breviats* argue the matter in contest, producing the witnesses to prove what they alledge; and then the judge sums up the evidence, and gives it in charge to the jury, to do impartially therein; at which time the clerk of assize, or his associate, files the writ, panel and record together, and makes a copy of the jury's names, and of the issue they are to try, which he delivers to the jury; and a bailiff being sworn to keep them without meat, drink, &c. they are then kept together till they all agree on the verdict.

The

The jury, when they are agreed, return to give in their verdict, and the plaintiff is then called; and if he do not appear, a nonsuit shall be recorded, &c. but if he appears, the clerk asks the jury who they find for, and what costs and damages, and so enters it on the back of the panel, and repeats it to the jury, which finishes the trial: and after that is over, the associate delivers to the plaintiff's attorney the record with the *distringas*, and the names of the jury annexed, on the back of which he writes the substance of the verdict; then upon the back of the record is ingrossed the *poslea*, (that afterwards the plaintiff and defendant came before such a judge, and the jury was elected and sworn, &c. and found such verdict and costs, &c.) and after it is to be carried to the clerk of the *poslea* to be marked, and then 'tis delivered to the clerk of the rules, and he makes a four-days rule for judgment; which rule being out, if judgment be not arrested, the record is to be stamp'd with a 2s. 6d. stamp on the back, and carried to the master of the office, who will tax further costs, when the judgment is fit to be entered, &c.

And in trials at the assises, the record and *distringas* are generally kept by the associate till the next term, and he indorses the *poslea*, receiving his fee for it at the trial: and then he is to be called upon for the same, and you proceed to have it marked, take out a rule, and sign judgment, as before is directed, and the judgment must be entered on a roll: also if a trial is had the last day of term, or at the sittings after, or the assises, judgment cannot be given thereupon until the first day of the next term; and judgment

ment being entered, execution is awarded, and writs of *capias ad satisfaciendum*, &c.

If verdict be incomplete, no judgment can be given upon it. *Say. Rep.* 36.

Indeb. ass. or debt will lie on a foreign judgment. *Dougl. Rep.* 1, 4, 5.

If one, knowing of a judgment, purchase, tho' for valuable consideration, purchase is fraudulent and void against judgment creditor. *Dougl. Rep.* 88.

Judgment entered before extent sued out, shall be preferred. *Dougl. Rep.* 415.

Judgment relates to first (essoign) day of the term. *Lofft's Rep.* 654. *3 Burr. Rep.* 1598.

Judgment may be entered up *nunc pro tunc*, at discretion of court. *1 Burr. Rep.* 148, 226.

Where action is brought on judgment recovered in *B. R.* and then defendant brings error, and obtains rule to stay proceedings in the *interim*, and plaintiff dies before affirmation of judgment, court will not permit it to be entered *nunc pro tunc*. *Durnf. and East's Rep.* 637.

Judgment cannot be signed, till twenty-four hours after demand of plea. *1 Bl. Rep.* 50.

Judgment entered up in breach of plaintiff's undertaking, set aside. *2 Bl. Rep.* 943.

Judgment of twenty years standing may be revived by *fi. fa.* but no execution till return of *scire feci*, or affidavit of personal notice to defendant. *2 Bl. Rep.* 995.

Warrant to confess judgment, for indemnification of bail, being executed while defendant in custody, and no attorney present; judgment thereon set aside. *2 Bl. Rep.* 1097.

Entry of judgment on writ of inquiry for more damages than laid in declaration, erroneous. *2 Bl. Rep.* 1300.

Judgment

Judgment may be entered at the suit of *one*, upon warrant of attorney to *two*. 2 *Bl. Rep.* 1301.

Judgment cannot be signed, in that defendant had not paid for issue, if more than due be demanded. 2 *Bl. Rep.* 1098.

Court will not set aside warrant of attorney to confess judgment, because given by defendant in custody without his attorney present, if executed purposely to defraud. *Cowp. Rep.* 141.

Such warrant is good if given by one in custody, under execution, though no attorney present; but if given for more than due, party will be relieved. *Cowp. Rep.* 281.

Court will order such warrant to be delivered up, if obtained by fraud, tho' judgment has not been entered up. *Dougl. Rep.* 196.

The presence of an attorney for defendant, upon confessing judgment, is necessary, where defendant is in custody at the same plaintiff's suit; but does not extend to warrants of attorney to confess judgments in other actions. 3 *Burr. Rep.* 1793.

Warrant of attorney to confess judgment given to a feme sole, who marries before judgment entered up; application must be made to enter up the judgment founded on affidavit; and judgment entered up without previous leave, is irregular, and will be set aside, but without costs. 3 *Burr. Rep.* 1471. See *Say. Rep.* 6.

The necessary affidavit. *Barnes* 42.

Warrant of attorney by one who practised as an attorney, good, tho' no attorney present; otherwise, if plaintiff an attorney. *Barnes*, 37. Cases by Sir Geo. Cooke, 94.

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Survivor may enter judgment by leave. *Barnes*, 40, 48, 53. *Say. Rep.* 6. *Wils. Rep.* B. R. 312.

Where warrant is twenty years old, rule to enter judgment, must be only *nisi*, &c. *Barnes* 41.

Attorney's clerk present at execution of warrant, insufficient. *Barnes*, 42.

Judgment entered on an old warrant of attorney, on affidavit of defendant being alive in *Jamaica*, four months before. *Barnes*, 256.

Warrant executed by defendant in custody, in presence of an attorney of B. R. sufficient. *Barnes*, 44.

Rule to enter judgment at the suit of executor, on a warrant to enter at the suit of testator, his heirs, &c. *Barnes*, 44.

Where leave may, and where not, be given by a treasury rule. *Barnes*, 47.

Judgment and warrant on usurious contract, set aside. *Barnes*, 25.

Judgment on warrant of attorney, signed day after defendant's death, refused to be set aside. *Barnes*, 270.

Judgment by warrant of attorney, suggested to be on an usurious contract, issue directed. *Barnes*, 277.

Judgment may be signed for want of a plea, at any time after twenty-four hours from time of plea demanded. *Durnf. and East's Rep.* 454.

"*Not guilty*" pleaded to an action of debt, is not such a nullity, as warrants judgment to be signed for want of a plea. *Durnf. and East's Rep.* 462.

Delay in demanding plea, does not prevent judgment being signed the day after the demand.

mand. *Loff's Rep.* 333. 1 *Bl. Rep.* 50. *Durnf. and East's Rep.* 454.

Judgment entered up in name of attorney without his knowledge or consent, set aside. 5 *Burr. Rep.* 2660.

Judgment against executor *de bonis propriis*, amendable. 5 *Burr. Rep.* 2730, 2731.

Small mistake no reason to set aside judgment. *Wilf.* 104.

Regular judgment in crown cause, cannot be set aside. *Wilf.* 163.

4. There may be new trials granted, in several cases; as where sufficient notice was not given the defendant of the former trial; if excessive damages are assessed by the jury; or a verdict is given against evidence; and when there was any fraud, &c. But generally a new trial shall not be had for too small damages, except action of covenant is brought for a sum certain, and the jury give damages under that, &c. and it should not be granted for want of any evidence at a former trial, that the party might then have produced, &c. 2 *Salk.* 647.

New trial granted, because judge dissatisfied with verdict. *Say. Rep.* 1, 2, 264.

New trial granted, because verdict contrary, in a point of law, to the direction of the judge. *Say. Rep.* 2, 35.

New trial granted, *after acquittal*, because defendant had not given due notice of trial. *Say. Rep.* 90. but *quare*.

New trial not to be granted, upon the after thoughts of jurors. *Say. Rep.* 35.

Nor for a mistake made by a witness, in giving his evidence. *Say. Rep.* 28.

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New trial ought not to be granted, but where substantial justice cannot otherwise be obtained. *Cowp. Rep.* 601.

New trial granted, under particular circumstances, after four days elapsed. *Dougl. Rep.* 171.

And may be at any time before judgment. *Dougl. Rep.* 797, 798.

Inferior courts cannot grant a trew trial. *Dougl. Rep.* 380.

Not grantable in every case, where verdict against evidence. *Lofft's Rep.* 146, 391, 457, 529. *Cowp.* 37. See *Burr. Rep.* 12, 664, 665.

New trial to be moved for, within four days. *Lofft's Rep.* 230.

Verdict against evidence, in general, is a good and constant reason, for granting a new trial. 1 *Burr. Rep.* 12. but not *always*. 1 *Burr. Rep.* 54. 2, 664, 665. 3 *Wils.* 45.

Motion for new trial, and in arrest of judgment, may not be made at one and the same time, motion for new trial should be the first. 1 *Burr. Rep.* 334.

Court may in any case grant a new trial, by reason of excessive damages. *Durnf. and East's Rep.* 277.

New trial refused plaintiff in *qui tam* action, for killing an hare. *Wils.* 17. 3 *Wils.* 59.

New trial never granted for want of evidence that might have been produced. *Wils.* 98.

New trial not granted, where defendant acquitted, in *qui tam*, informations, or for any criminal matter. *Wils.* 298. but for defendant it may. 329.

New trial not to be granted, where evidence on both sides, though verdict against judge's opinion. *Wils.* 22. *Bl. Rep.* 1. S. P. See 3 *Wils.* 38, 39.

New trial refused for giving 300*l.* damages, for a few hours false imprisonment. 2 *Wils.* 160, 205.

So for giving 1000*l.* damages to an attorney for six days imprisonment, rummaging his desks, books, and papers, under a secretary of state's warrant. 2 *Wils. Rep.* 244.

So for giving 200*l.* for a small assault and battery, about property of a turtle. 2 *Wils.* 252.

New trial for misdirection of judge, in point of evidence. 2 *Wils.* 269.

New trial not granted, as verdict was for the honest and just party. 2 *Wils.* 306.

Surprise *may not* be ground for a new trial. *Bl. Rep.* 298.

If a new trial granted, where plaintiff refuses to be nonsuit, contrary to opinion of judges, it shall be without costs. *Bl. Rep.* 670. 2 *Bl. Rep.* 698.

Where new trial without payment of costs. *Bl. Rep.* 298. 2 *Wils. Rep.* 146.

Where new trials in ejectment, not usually granted, where verdict for defendant, otherwise, if for plaintiff. *Bl. Rep.* 348.

No new trial after full trial, if no fresh light shewn. *Bl. Rep.* 418.

Benefit of new trials. *Bl. Rep.* 464.

New trial not to be moved for on same point of law, as contained in bill of exceptions. 2 *Bl. Rep.* 929.

New trial seldom granted for excessive damages, in personal torts. 2 *Bl. Rep.* 929, 1327. *Cowp.* 230.

Trials at bar are ordained by statute, where causes require great examination, and the title

in question is difficult or intricate, for the better satisfaction of the parties concerned; and officers of the court, and barristers at law may insist upon a trial at bar, after which no new trial will be permitted. After a motion in arrest of judgment, the party shall not move for a new trial; but after motion for a new trial, he may move in arrest of judgment. *Stat. Westm. 2. 13 Ed 1. 2 Lil. Abr. 609. 2 Salk. 648.*

Trial at bar ought not to be granted, before issue joined, in any action, except of ejectment. *Say. Rep. 155.*

Trial at bar not grantable, merely because the cause is expected to last long, or that the matter in question is of great value. *Say. Rep. 79.*

Trial at bar refused, where party applying would not consent to the usual terms of mutual justice and convenience. *Loff's Rep. 159.*

Trial at bar may be granted out of an issuable term. *Loff's Rep. 159.*

In affidavit for obtaining trial at bar, particular difficulty expected to arise in the course of the cause, must be pointed out. *Say. Rep. 79.*

Trial at bar by special jury of citizens of London, who waived their privilege. *2 Wilf. 136.*

The causes of arrest of judgment are, Want of notice of trial; where the record differs from the deed pleaded; for any material defect in pleading; where persons are misnamed; the declaration doth not lay the thing with certainty, &c. and here all matters of fact are proved by proper affidavits.

After

After trials, *execution* follows, for obtaining possession of the thing recovered by judgment of law. And execution is either in personal, real or mixed actions: in personal actions it may be three ways, *viz.* by *capias ad satisfaciendum* against the body; *fieri facias* against the goods; or *elegit* against the lands, &c. And in real and mixed actions, the writs of execution are *habere fac. seisinam*, to put the party in possession of freehold land recovered; and *habere fac. possessionem* to put him in possession of his term, &c. *Co. Lit.* 289. 5 *Rep.* 86.

When a judgment is signed, execution may be taken out immediately upon it; but if it be not issued within a year and a day after, where there is no fault in the defendant, there must be a *scire facias* to revive the judgment: and if the plaintiff proceed not on the *sci. fac.* he may upon the judgment bring action of debt, &c. In action where special bail hath been given, the plaintiff may have execution against the defendant, or prosecute his bail: tho' if you first take out a *cap. ad satisfaciend.* you are debarred from taking out any other writ of execution. *Co. Lit.* 290. 2 *Inst.* 471, 395.

If a person in execution dies, anew execution may issue against his lands, &c. as if he had never been taken in execution, by statute: and writs of execution bind the property of goods from the time of delivery of the writ to the sheriff, &c. But land is bound from the day of the judgment. Sheriffs may deliver in execution all lands whereof others shall be seised in trust for him against whom the execution is had on a statute, judgment, &c. though if there are chattels sufficient, a sheriff ought not to take the land. *Stat.* 21 *Jac.* c. 24. perpetu-

ated by 1 Jac. 2. c. 17. s. 5. 29 Car. 2. c. 3. Lil. Abr. 565.

One may not generally be delivered out of prison when there in execution, but by writ of *superfedeas*: and if a man committed to prison, for any misdemeanor, is there taken in execution, he shall not be set at large. The *capias ad satisfaciendum* lies not against a peer of the realm; nor against executors or administrators except on a *devastavit*, &c. T. Raym. 58. Cro. Jac. 143.

Warrant of attorney to confess judgment, is good, if given by one in custody under an execution, tho' no attorney be present on his behalf, for the rule of *Easter Term*, 15 Car. 2. does not extend to it; but if party had been prevailed on to acknowledge it, &c. for more than due, court would relieve under circumstances. Cowp. Rep. 281.

If plaintiff cannot find sufficient effects to satisfy his judgment, court will order sheriff to retain for his use money which he has levied in an action, at the suit of the defendant. Dougl. Rep. 231.

Execution never to be taken out, but for what is actually and *bonâ fide* due. Lofft's Rep. 280.

Fi. fa. after *fi. fa.* executed fraudulently shall be preferred. Wilf. 44.

The writ of *feri facias* lieth for debt or damages, as well against executors or administrators, as any others, to be levied of the testator's goods, &c. But goods of a stranger in the possession of the defendant shall not be subject to the execution; for the sheriff at his peril must take notice whose they are; and on this writ, a sheriff

sheriff cannot break open doors, to take goods. The sheriff is to sell the goods and chattels of the defendant, and after the debt is levied, is debtor to the plaintiff: and the sale of the sheriff shall take effect, tho' the judgment is afterwards reversed; but the defendant shall be restored to the value. *Dalt. Sher.* 60. *Rol. Abr.* 892. 8 *Rep.* 96.

There may be a *testatum fieri fac.* into another county, if the defendant hath not goods enough in the county where the action is laid to satisfy the execution: and if all the money be not levied on this writ, there may be a second writ of execution, on return of the first, reciting the same. 2 *Salk.* 589. *Salk.* 318.

A sheriff having taken goods, and levied the money by virtue of a *fieri facias*, ought to bring it into court, and not to pay it to the plaintiff. *Godb.* 147. *pl.* 188. in 2 *Show.* 87. *pl.* 78. the contrary is held.

Fi. fa. cannot be sued out against an executor or administrator, until writs of *sci. fa.* have been sued out. *Say. Rep.* 266.

The writ *elegit* commands the sheriff to deliver to the person recovering, all the goods and chattels of the defendant, (beasts of the plough excepted,) and half of his lands, &c. to be held until the whole debt and damages are satisfied: and it is done by a jury, summoned by the sheriff to inquire what land the defendant had, at the time of the judgment. This writ may be sued after a *fieri facias* returned *nulla bona*, &c. And if tenant by *elegit* be put out of possession before satisfaction received, he may have action of trespass, or re-enter, and hold over till satisfied; after which, the defendant may enter, and

if

if more be levied than the debt, &c. shall have damages. *F. N. B.* 267. *Hob.* 57. *Cro. Eliz.* 656. 4 *Rep.* 67.

If lands are once taken in execution on an *elegit*, and the writ is returned and filed, the plaintiff shall have no other execution: where the defendant hath lands in more counties than one, and the plaintiff awards *elegit* to one county, and extends the lands thereupon; if he then files it, he cannot sue out an *elegit* into the other counties: but immediately after entry of the judgment, he may award as many *elegits* into as many counties as he thinks fit, and execute all, or any of them. *Lev.* 92. *Cro. Jac.* 246.

The plaintiff, at the return of an *elegit*, prays a new *elegit*; he shall have it, if he hath not accepted of the first: so if all the lands extended are evicted by better title, &c. *Cro. Eliz.* 310. 4 *Rep.* 66. *Stat. Westm.* 2. c. 18.

Sheriff on *elegit* not bound to deliver moiety of each particular tenement and farm, but only certain tenements and farms, making, in value, a moiety of the whole. *Dougl. Rep.* 473.

Land extended under *elegit*, must be set out by metes and bounds. *Dougl. Rep.* 476.

To writs of execution the defendant cannot plead; but he may have *audita querela* for any matter since the judgment, to discharge him of the execution; upon which the justices shall hear the complaint, and do right. And the writ *audita querela* is usually where judgment is given against a man, &c. and his body in execution, upon suggestion of just cause why execution should not be granted; as a release, &c. This writ lies not after judgment upon a matter which the party might have pleaded before;

and 'tis granted where no other remedy can be had, when persons are unreasonably charged, &c. *Co. Lit.* 290. 2 *Inst.* 396.

If a debt is released after verdict, or after judgment or execution, and it is so that the defendant hath not a day in court to plead it; there he must be relieved by *audita querela*: and on allowance of the *audita querela* bail, shall be given; by which the party is in custody of the law; and if he make not out his complaint, he must render his body in execution again, or pay the debt for which he is in execution, or else his bail must pay it. 36 *H. 6.*

24. *Cro. Jac.* 645.

Where after judgment against bail to an action, the judgment against the principal is reversed, or the money paid by the principal, the bail may have *audita querela*. 8 *Rep.* 143. See Dougl. Rep. 68. Cowp. 136. 2 Burr. 799. 901. 3 Burr. 1322. 2 Bl. Rep. 372.

By *statute*, persons charged in execution for any sum not exceeding 100*l.* in any gaol or prison, being minded to deliver up all their effects to their creditors towards satisfaction of their debts, may exhibit a petition to the court from whence the process issued, certifying the cause of their imprisonment, and an account of their estate, &c. and thereupon the court is by order or rule to cause the prisoner to be brought up, and the creditors to be summoned to appear at a day appointed, when the court shall in a summary way examine the matter, and hear what shall be alledged on both sides, for or against the discharge of such prisoner, tendering to the prisoner an oath, that the account delivered in is a full and true account of all his estate, (except wearing apparel and bedding, &c. not exceeding 10*l.* value;) and if thereupon the creditors

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ditors are satisfied, the court may order the lands, goods and effects contained in the account to be assigned to the creditors, by indorsement on the back of the petition signed by the prisoner; and upon such assignment executed, the prisoner shall be discharged out of prison, without paying any fee, by order of court: but in case the creditors shall not be satisfied with the oath, the court shall remand the prisoner, and order him and his creditors to appear at another day; and then if the creditors cannot discover any estate or effects of the prisoner omitted, &c. the court shall immediately cause the prisoner to be discharged, unless any creditor insists upon his being detained, and agree to pay him 2s. 4d. per week, and on failure of any payment, he shall be discharged. 32 Geo. 2. c. 28.

The person so discharged out of prison shall never after be arrested for the same debt; but the judgment against him is to stand in force, and execution may be taken out thereon against his lands or goods, &c. afterwards; and if any prisoner shall be convicted of perjury in his oath, he shall suffer the pains inflicted for such offences, and may be retaken, and charged again in execution. *Stat. ibid.*

And prisoners in execution as aforesaid, in any prison (except in *London* and *Westminster*,) before they petition the court to be discharged, &c. are to give notice to their creditors at whose suit they were charged, that they design to petition, with a true copy of the account of their whole estates intended to be delivered in to the court, &c. and then on such petition, the prisoner shall have a rule of court to be brought to the next assises for the county; and the

the creditors shall be summoned to appear there thirty days before, and at the assises the judges on examination shall determine the matter, and give judgment and relief, &c. The charge of carrying the prisoners to the assises not to be above 12*d.* a mile, to be paid out of their effects, or if they have none, out of the county stock. 32 *Geo. 2. c. 28.*

Prisoner may be removed by person at whose suit he has been taken in execution, out of the custody of the sheriff, into the custody of the marshal. *Say. Rep. 154.*

The first payment of 2*s.* and 4*d.* is to be made to a prisoner, upon day of giving him notice, and weekly payment is afterwards to be made, first day in every week. *Say. Rep. 102.*

If no proceedings against prisoner, for want of appearing within four months, he, upon entering appearance, intituled to a *superfedeas*. *Say. Rep. 111.*

If upon prisoner's being brought up by *hab. corp.* it appear he is in custody under an illegal judgment, he may be discharged. *Say. Rep. 44.*

Prisoner in marshalsea court cannot be removed by *hab. corp. ad respondend.* to answer for same debt, in a new action in *King's Bench*. *Cowp. Rep. 116.*

Declaration must be served on prisoner, or left with turnkey, though he has appeared by attorney. 2 *Bl. Rep. 786.*

Fugitive not a prisoner liable to be served with a declaration. 2 *Bl. Rep. 970.*

Declaration against prisoner in custody of sheriff, must be alledged at whose suit detained. 1 *Wils. Rep. 120.*

If

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If prisoner appear in person, he must pay for issue book. *2 Wils. Rep. 11.*

Prisoner having, by pleading to *sci. fa.* prevented party from charging him in execution, within two terms, shall not be thereby discharged out of custody by *superseas*. *2 Wils. Rep. 378.*

Gaoler bound to receive prisoner tendered to him, after return day of writ, on which he was arrested. *1 Durnf. and East's Rep. 60.*

Quere, whether gaoler is not likewise bound to receive a prisoner arrested after return day. *1 Durnf. and East's Rep. 60.*

Declaration need not be delivered to the defendant personally, or to gaoler, unless in custody at suit of some plaintiff, and for same cause of action. *Durnf. and East's Rep. 191.*

Notice must be given of abandoning an erroneous committitur, before a second rectifying the mistake of the former, be entered. *Durnf. and East's Rep. 227.*

Superseas obtained after judgment, cannot be pleaded in bar to action on the judgment. *Durnf. and East's Rep. 273.*

Prisoner discharged out of custody of marshal, because no acknowledgement by him of his being in custody in term, wherein he was charged in execution. *Durnf. and East's Rep. 464.*

Where prisoner in execution is discharged by consent of creditors, upon his giving fresh security to satisfy the judgment, which is afterwards defeated merely for informality; the judgment cannot be set off against prisoner's demand. *Durnf. and East's Rep. 557.*

So

So long as prisoner remains in same custody, and under same process, if once supersedable, always continues so; but not if in another custody, or under other process. *Durnf. and East's Rep.* 591.

Prisoner intitled to be discharged out of marshal's custody, if committitur be not actually entered on record; before end of second term; it's being in marshal's book, not sufficient. *3 Burr. Rep.* 1841.

Declaration against prisoner, without a bill being previously filed, not good. *Say. Rep.* 49.

Defendant arrested within two days of the end of *Easter Term*, by writ issued before the end of said term, and remaining in custody of sheriff or marshal, till after the end of the then next subsequent term, without being charged with declaration, discharged. *3 Burr. Rep.* 1450.

Declaration against a prisoner, must be filed before the end of the second term, after his imprisonment. *3 Burr. Rep.* 1452, 1787.

Time to be computed from notice of his being in custody. *3 Burr. Rep.* 1787, 1788.

Notice to plead may be good, though given only a little time before the effoin [day of the subsequent (*third*) term. *3 Burr. Rep.* 1452.

Surrender in discharge of bail, equally intitles to be so supersedable, as if the person, had been taken and remained two terms in custody, after being taken, and plaintiff had neglected to declare. *3 Burr. Rep.* 1788.

Two years imprisonment, without prosecution, cause for discharge. *Wils.* 254.

Prisoner

Prisoner not to be discharged by *superseatas*, having prevented party charging him in execution, by pleading to *sci. fa.* 2 *Wils.* 378.

Not obliged to charge prisoner in execution, second term after judgment, writ of error being brought. 2 *Wils.* 380.

Not obliged to declare against prisoner within two terms, while treaty subsists between the parties. 3 *Wils.* 455. 2 *Bl. Rep.* 918.

Prisoner attainted, and afterwards charged in civil suit, by leave of chief justice, not to be discharged on motion. *Bl. Rep.* 30. 2 *Wils.* 17. *Fost. Cr.* 61.

Prisoner within the rules, cannot execute warrant to confess judgment, without presence of his own *bonâ fide* attorney. 2 *Bl. Rep.* 1297.

Writs of error to reverse and set aside judgments and executions.

A Writ of error issues out of *Chancery*, and lies where any one is grieved by the proceedings and judgment in any court of record; it is returnable in *B. R.* and if upon the transcript of the record sent into that court, it appears there is error in the process, or in the giving of judgment, then 'tis reversed: but if there appear to be none, then is the judgment affirmed with double costs.

On judgments given in the *King's Bench*, where the suit is by bill, writ of error lies out of the *Chancery* returnable in the *Exchequer-chamber*, before the judges of *C. B.* and barons of the *Exchequer*, &c. But if the suit is by original

ginal writ, or where the king is party, or if it be after judgment affirmed in the *Exchequer-chamber*, writ of error lies only in *parliament*: to reverse a judgment in the *Common Pleas*, the writ is to be returned in *B. R.* and error is not to be brought in *parliament*; except a judgment of that court is affirmed, &c. in the *King's Bench*: and erroneous judgment given in the *Exchequer*, is to be examined and corrected by the lord chancellor, &c. and some of the justices. *Stat. 27 Eliz. c. 8. 31 Eliz. 1. 31 Ed. 3. c. 12.*

When a writ of error is brought the party is in the time appointed by the rule to certify the record; and he must cause the roll where the judgment is entered to be marked with the word *error* in the margin, whereby the other party may take notice of it; and the plaintiff's attorney may take out execution upon the judgment, if a *superfedeas* be not taken forth, allowed with the sheriff of the county: and in all cases after verdict, in actions of debt on bond, for the payment of money, or upon any contract, &c. the person that brings writ of error must put in good bail, to prosecute his writ with effect; and to pay the debt and damages, and also all costs and damages for delaying of execution, if judgment be affirmed. For if bail be not put in, the writ of error is no *superfedeas* to the execution; but the writ is in being, until a *nolle prosequi* entered, or judgment affirmed, &c. *3 Jac. c. 8. made perpetual by 3 Car. c. 4. 6 Rep. 26.*

Any person damaged by error in a record may bring a writ of error to reverse it; and the chief justice only, or the eldest judge, ought to allow a writ of error: the errors of a judgment

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Of Courts, Juries,

are to be assigned upon the record, to appear to the court; and if they are not assigned in the term, the writ of error shall abate. A judgment cannot be reversed in part, and stand good for other part; but if there be error in awarding execution, the execution only, and not the judgment shall be reversed: and if a judgment is reversed by writ of error, the plaintiff may bring a new action for the same cause. *Cro. Jac. 534. Telo. 112. Hob. 90.*

2 Ld. Raym.

1587.

2 Stra. 902.

Barnard.K.B.

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All writs of error, wherein there shall be any variance from the original record, or other defect, may be amended by the court; and where any verdict hath been given, in any action in the courts at *Westminster*, or other court of record, the judgment thereon shall not be stayed or reversed for any defect, or fault in form, or substance, in any bill, writ, &c. or for variance in such writs from the declaration or other proceedings. 5 Geo. c. 13.

On writ of error from *King's Bench* to House of Lords, only transcript of record is sent up; and when remitted, *King's Bench* awards execution. *Cowp. Rep. 843.*

But on writ of error from *Common Pleas*, tho' transcript only is removed into the *King's Bench*, the latter may award execution. *Cowp. Rep. 843.*

If error assigned on mistakes in form, same may be amended in court below, pending the writ; and this too, in a penal action. *Dougl. Rep. 114.*

Avowant not intitled to costs or damages, on affirmance by court of error of judgment in his favour. *Dougl. Rep. 709. n.*

Modern practice of court of *King's Bench*, allows interest on money recovered by judgment below, when affirmed. *Dougl. Rep. 753.*

Not

Not to have a *non precedendo* for want of transcribing, till certificate of there being no transcript. *Lofft's Rep.* 329.

Writ of error, no *superfedeas* to execution, unless bail be put in, within four days. *Lofft's Rep.* 752.

The allowance of a writ of error, and not the notice of it's being allowed, is the *superfedeas*. *1 Burr. Rep.* 340. *Durnf. and East's Rep.* 279. *S. P.*

Error lies not from the courts of the city of London, to B. R. tho' it does lie thither, from all other corporation courts. *2 Burr. Rep.* 777.

No bail on error of judgment in debt, upon the judgment. *1 Bl. Rep.* 506.

Upon what bonds, bail shall be put in, in error. *1 Wilf. Rep.* 19.

Bail in error on a judgment in debt on bond, where each bound in sum recovered, it being the penalty and double the sum due. *1 Wilf. Rep.* 213.

Bail in error who refuses to justify, may have his name struck out of bail piece at any time. *1 Wilf. Rep.* 337. *Say. Rep.* 58.

Time for perfecting bail in error, refused, because no real error. *2 Wilf. Rep.* 144.

Sci. fa. in error need not lie four days in the office. *4. Burr. Rep.* 2439.

Prisoner need not be charged in execution second term after judgment, if he has brought error. *2 Wilf. Rep.* 380.

Bail in error must be put in within four days after final judgment signed, without referring to time of allowance, or service of copy. *Durnf. and East's Rep.* 279.

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Error

Error on judgment and transcript, writ not determined; action of debt on judgment, and judgment by default; proceedings stopped till error determined. 4 Burr. Rep. 2454, 2455.

Bail undertakes to pay debt and costs, within four days after affirmance in *Exchequer-chamber*; upon judgment being affirmed, defendant below brings writ of error returnable in parliament; proceedings stayed till final affirmance. 5 Burr. Rep. 2820.

Leave given to imparl in debt on judgment, till error brought on judgment be determined. Say. Rep. 161.

New bail shall be given to amended writ of error in *Common-Pleas*, where writ is amended in B. R. 2 Bl. Rep. 1067.

Allowance of error, on judgment by *nil dicit*, is an entire *superseas*. 2 Bl. Rep. 1483.

There must be bail to writ, in error on judgment, on *sci. fac.* against bail. 2 Bl. Rep. 1227.

Bail in error cannot surrender, but must pay debt and costs on affirmance of judgment. Lofft's Rep. 238. Durnf. and East's Rep. 624.

Bail shall have time to surrender principal after writ of error, upon different terms, according to circumstances. 1 Burr. Rep. 340.

Notwithstanding error and bail thereon, defendant may be held to bail in debt on judgment, if no bail in original action. 2 Bl. Rep. 768.

Bail in error upon judgment in ejectment, justify in double rent. 4 Burr. Rep. 2502.

One alone cannot bring a writ of error against several. 3 Burr. Rep. 1791, 1792.

Court of error cannot award a *ven. de novo*, when proceedings originate in inferior court. Durnf. and East's Rep. 151.

Writ

Writ of error does not now lie from *Ireland*, to the court of *King's Bench* in *England*. See *Stat. 20 Geo. 3. c. 18.*

Of Estates in Lands and Goods, and how acquired; Ancestors, Heirs, Executors and Administrators.

ESTATE is that title or interest which a man hath in lands, tenements, or other things. And estates are real, of lands and tenements; or personal, of goods and chattels; otherwise distinguished into freeholds, that descend to the heir, and chattels which go to the executors: also some estates are made by words, and others implied by law; and the word *estate* in deeds and grants generally comprehends the whole in which the party hath an interest or property, and will pass the same.

The estates and lands we have in this kingdom, are obtained and held in divers manners:

1. By descent and right of blood.
2. Conveyance, or grant from one man to another.
3. Antient tenures and holdings of lands.

Descent is where a man hath land or other estate of inheritance in fee-simple, and dieth without making any disposition thereof, but leaveth it to go (as the law calleth it) to the heir: it is a means whereby lands or tenements are derived to a man, as heir and by right of blood,

blood, from an ancestor; and this is the worthiest means whereby lands can be acquired.
Co. Lit. 13, 237.

In descents, the next and most worthy of blood shall inherit; as the male and all descendants from him, before the females; and the elder brother and his posterity, before any younger brother, &c. A sister of the whole blood shall be preferred before the younger brother of the half blood: but such younger brother may be heir to his father or uncle; though not to a brother, for want of the whole blood. And a person to have land in fee-simple, by Descent, must be Heir of the whole blood: by which rule, where lands descend to the son from the father, and he enters and dies seised, without issue, this land shall go to the heirs of the part of the father; and if there be none such, it shall escheat. *Co. Lit. 14. 3 Rep. 4.*

And descent is lineal, or collateral; lineal is downwards in a right line, from grandfather to father, father to son, &c. and the lineal heirs shall first inherit: collateral is a descent which springeth out of the side of the whole blood; as the grandfather's brother, father's brother, and so downwards: so that if a man purchase lands in fee-simple, and dies without issue, for default of the right line, he who is next of kin in the collateral line of the whole blood, shall have the land, by descent as heir to him. In case of descents, when land descends on the part of the father, the heirs of the mother shall not inherit; and where lands descend on the part of the mother, the heirs of the father shall not inherit: 'tis otherwise in case of purchase, where a son purchases lands, and dies without leaving issue; if there be no heirs on the part of the father,

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those on the mother's side shall inherit the lands.

1 *Inst.* 10, 11, 13. 1 *Vent.* 415.

Inheritances may lineally descend, but not ascend; and in the right line, children shall inherit their ancestors without limitation; but the ancestors may not take from the children, for the father can never come to the lands which his son hath purchased by lineal ascent; though he may by collateral ascent, where the land of the son comes to his uncle, and then to his father: in the collateral line, the uncle inherits the nephew, and the nephew the uncle. The elder brother of the whole blood shall have land by descent, that is purchased by a middle or younger brother, if they die without issue: and when there is no brother or sister, the uncle shall have it as heir; but it may afterwards descend to the father, as heir to the uncle; and if after the descent to the uncle, the father hath issue another son or daughter, that issue shall enter upon the uncle, and hold the estate. *Co. Lit.*

11. 3 *Rep.* 40. *Vaugh.* 244.

There is a difference between descents from father and mother to their children, and between brothers and sisters; a son or daughter need be only of the blood either of father or mother, which hath the inheritance: but the brothers and sisters must be of the same father and mother, to inherit one another. From this it is, that if a man hath issue two sons by divers venters, the younger brother of the half blood shall not have the land purchased by the elder brother, on his dying without issue; but the elder brother's uncle or next cousin. If a man hath two wives, and by one wife he has a son and a daughter, and a son by the other, and then dies seised of land in fee simple; here, if the elder

son die without any issue, before actual seisin, the land shall descend to the younger brother; but if the elder brother had entered, then the sister shall have the land as heir to him. *Co. Lit. 14. 15. 3 Rep. 41. Noy 68.*

As in descents one must be heir to him that was last actually seised; so none can inherit lands as heir, but the blood of the first purchaser. Though the law takes no notice of the disability of the father in case of descent, relating to brothers and sisters, as to their estates: a man, who had issue a son and a daughter, was attainted of treason, the son having purchased lands, and died without issue; and it was held, that notwithstanding the attainder of the father, the daughter shall take by descent from her brother, because the estate between them was immediate, and therefore the father's inability shall not hinder it. *Co. Lit. 12. Lit. 8. 4 Leon. 5.*

By descent, lands in fee simple shall go, 1. To the eldest son as heir, and to his issue; the sons first, in order of birth, and for want of sons, to all the daughters equally, who are called parceners, and all of them inherit as one heir. 2. If the eldest son hath no issue, then to his next eldest brother of the whole blood, and his issue; and for want of a brother, to a sister or sisters of the whole blood, and her and their issue. 3. If there be no brother or sister, then to the uncle, and his issue; and for want of an uncle, to an aunt or aunts, and their issue. 4. And if there be no uncles or aunts, then to cousins, in the nearest degree of consanguinity. And where lands are purchased by *brethren*, after uncles and aunts, the land shall go to the father, and the half blood, and their issue; and for want of uncle, aunt, father and half blood, to the next
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of kin in the collateral line: here the half blood come in after the father, as being of the whole blood to him, tho' not to their brethren. *Co. Lit.* 163, 12; *See Wood's Inst.* 221. In descent of estates, this half blood is no hindrance; for the issue are *in per formam doni*, and always of the whole blood to the donee. *3 Rep.* 41.

Sometimes descent is by custom of fee-simple lands to all the sons, or to all the brothers, where one dies without issue, as in *Gavelkind* in the county of *Kent*: all the sons shall inherit, like unto sisters at common law; and the heir at the age of fifteen years may give and sell his lands, and tho' his father be attainted of treason or felony he shall inherit. *Co. Lit.* 140.

And there is a customary descent of lands in some ancient boroughs and manors, to the youngest son, and sometimes to the eldest daughter, &c. as in *Borough English*; and by other customs: but where the youngest son dies, having no issue, the eldest son is heir to him. *Kitch.* 102.

As to descents of *Borough English* lands, the custom goes with the land, and guides the descent to the youngest son; altho' there be devises, &c. to the contrary. *2 Lev.* 138.

In the learning of descents in general, there are some things further to be taken notice of:

1. Where parties are in by descent, or purchase.

2. Where descents toll an entry.

1. Descent being created by law, and the most ancient title, an heir is in by that, before a grant, or devise. If a man gives fee-simple lands by will to one who is heir at law, the devise

wife is void, and he shall take by descent: and where a father devises his land to his wife for life, and after her decease to his eldest son; tho' the son doth not take the estate presently on the death of the father, he shall be in by descent, and not by purchase, and the devise shall be void as to him. *Dy. 126. Style 148. old statutes*

When the heir takes that which his ancestor would have taken if living, he shall take it by descent; and not by purchase: but generally where an estate is devised to the heir at law, attended with a charge, as to pay money, debts, &c. in such case he takes by purchase, and not by descent. And a man can have lands no other way than by descent or purchase. 2 *Dart. Abr. 357. Lutw. 593. old statutes*

2. A descent which takes away an entry is where one dies seised of lands, in which another hath right to enter, and it descends to his heir; such descent shall take away the other's right of entry, and put him to his action for recovery thereof: but a descent shall not take away the entry of lessee for years, &c. who hath no freehold; and if it be of such things as lie in grant; as advowsons, rents, commons in gross, &c. it puts not him that hath right to his action. And tho' where a disseisor dieth seised, and the law casteth the lands upon his heir, this is a descent which tolls an entry at Common-law; by statute, it is only where the disseisor had peaceable possession five years. *Co. Lit. 237, 238. Stat. 32 H. 8. c. 33.*

The heir is to enter into lands descended to him, to intitle him to the profits, &c.

A conveyance is a deed which passeth lands and tenements from one man to another: and of these

these deeds and conveyances there are several sorts.

LANDS CONVEY'D.

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| 1. By feoffment. | 5. By surrender. |
| 2. By lease and release, and confirmation. | 6. By gift and grant. |
| 3. By bargain and sale. | 7. By lease. |
| 4. By fine and recovery. | 8. By mortgage. |
| | 9. By assignment. |
| | 10. By will. |

1. Feoffment is a grant or conveyance of any manors, messuages, lands or tenements to another in fee, to him and his heirs for ever, by the delivery of seisin and possession of the thing granted: and in every feoffment the grantor is called the feoffor, and he that receives by virtue thereof is the feoffee. And the livery and seisin is made in the presence of witnesses, all persons being removed from the lands, &c. when the feoffee or his attorney makes an entry on the premises. *Lit. lib. 1.*

The deed of feoffment is our most ancient conveyance of lands; and is said to excel the conveyance by fine and recovery: for it clears all disseisins, abatements, intrusions, and other wrongful estates, which no other conveyance doth; and for that it is so solemnly and publickly made, it has been of all others the most observed. It bars the feoffor of all present and future right, and collateral benefit, as conditions, power of revocation, &c. and destroys contingent uses: but feoffment may not be of such things whereof livery of seisin cannot be made; the livery being a ceremony used by which the common people may see the passing

or alteration of the estate; and if either of the parties die before livery and seisin, the feoffment will be void. *West. Symb.* 235. *Plowd.* 554. 214. *Co. Lit.* 5.

As a feoffment is a Common law conveyance, and executed by livery, it makes a transmutation of estate; but a conveyance on the statute of uses, such as a covenant to stand seised, &c. makes only a transmutation of possession, and not of estate. If a feoffment in fee be inrolled, but no livery made; it is no good feoffment, but the inrollment shall conclude the person to say that it was not his deed: but where a bargain and sale of lands is not inrolled, and the bargainor delivers livery and seisin of the land, according to the form of the deed, it has been held a good feoffment. 2 *Lev.* 77. *Poph.* 6. 2 *Andr.* 68.

Where a man makes a feoffment, without any consideration; by that the estate passes, but not the use, which shall descend to the heir. A feoffment in fee, made by tenant in tail, doth not give the inheritance of the tail, to the feoffee, nor is he thereby tenant in tail; for none shall be such but he who is comprehended in the gift made by the donor: but it gives away all the immediate estate the feoffor had: though if lessee for life, and the reversioner in fee, make a feoffment by deed, each grants his estate; the lessee is in by livery, and the fee from him in remainder. *Leon.* 182. *Plowd.* 562. *Hob.* 335. 6 *Rep.* 15.

A deed of feoffment is always applied to a corporal and immoveable thing; as a house or land, &c. And a feoffment of lands, to hold to the feoffee and his heirs, after the death of the feoffor, though livery be made upon it, yet it is a void feoffment; for an estate of freehold in
lands

lands cannot begin at a day to come: but a lease for life in reversion, after the death of another, is a good estate in reversion. *Hob. 171. 2 Nels. Abr. 846.*

At Common law, before lease and release, feoffment was the general conveyance; but if livery and seisin could not be made, by reason there was a tenant in possession, the reversion was granted, and the particular tenant attorn'd. *Co. Lit. 49.* Now the deed of lease and release has taken place of this deed; the statute 27 H. 8. c. 10. uniting the use to the possession, without actual entry, &c.

Nature and operation of feoffments of old, attended with livery, and actual transmutation of the possession, from one man to another. *Cowp. Rep. 702, &c.*

If tenant *ex parte maternâ* make a feoffment to the use of his maternal heirs, and the feoffee re-infeoff him expressly to the use of those heirs, yet the re-infeoffment shall enure to the paternal heirs. *Dougl. Rep. 773, &c.*

The operation of an ejectment. 1 *Burr. Rep. 92.*

2. Lease and release is the most common deed of conveyance now in use; to convey any right or interest in lands or tenements, to another who hath the possession thereof. And this conveyance by lease and release amounts to feoffment, the use drawing after it the possession, and supplying the place of livery and seisin, required in that deed.

In the making of it, a lease or bargain and sale for a year, or such like term, is first prepared and executed; to the intent that by virtue thereof the lessee may be in possession of the lands intended to be conveyed by the release, and

Of Estates, Ancestors, Heirs, &c.

and thereby, and by force of the statute 27 *H.* 8. c. 10. for transferring of uses into possession, be enabled to take a grant of the reversion and inheritance of the said lands, &c. to the use of himself and his heirs for ever: upon which, the release is made, reciting the lease for a year, and declaring the uses. And in these cases a pepper-corn rent in the lease for a year is a good reservation, and sufficient to raise an use, to make the lessee capable of a release. *8 Vent. 35.*

The lease for a year must have the words *bargain and sale* for money; and 5s. or any other sum, altho' never paid, will be a good consideration; whereupon the bargainee for a year is immediately in possession, on the executing of the deed, without actual entry: but if only the words *demise, grant, and to farm let* are used, in that case the lessee cannot accept of a release of the inheritance until he hath actually entered, and is in possession. *2 Lil. Abr. 435.*

A lease and release make but one conveyance, being in the nature of one deed: and to the perfection of this deed, it is required that he who makes the release have an estate in himself, out of which the estate may be derived to the releesee; the releesee is to have an estate in possession, in deed or in law, in the land whereof the release is made, as a foundation for the release; and there must be sufficient words in law, not only to make the release, but to create and raise a new estate, or the release will not be good. It is necessary in all cases where a release of lands is made, that the estate be turned to a right, and there are two rights to the estate and also to the possession: or else there must be privity of estate between the tenant in possession
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tion and the releffor, without which a release will not operate. *Co. Lit. 22. Mod. 252. 2 Lil. Abr. 435.*

In case a release be made by one, that at the time of the making thereof had no right; or to a man that at that time had nothing in the lands, such release is void, because he ought to have a freehold, or a possession, or privy. But if a man make a lease for life, remainder for life, and the first lessee dieth; and then the lessor releases to him in remainder, before entry, this is a good release to enlarge his estate; he having an estate in law capable of enlargement by release before entry had. *Noy, Man. 74. Co. Lit. 270.*

A release to a man and his heirs, will pass a fee-simple; and if made to a person and the heirs of his body, by this the releesee hath an estate-tail. And where a man releases to another all his right which he hath in the land, without using any more words, as to hold to him and his hers, &c. the releesee hath only an estate for life. *Dy. 263.*

These releases, that enure by way of passing away any estate, may be made upon condition, or with a defeazance; so as the condition, &c. be contained in the release, or delivered at the same time with it: and there may be in this deed a recital, covenant, warranty, &c.

A confirmation is in nature of a release, where one having right unto lands makes a deed to him who has possession of them, to enlarge his estate, or make his possession perfect. And it is likewise a means whereby a voidable estate is made sure and unavoidable. *Co. Lit. 295.*

And this confirmation which is often joined to lease and release, may be for perfecting an estate, by making a conditional estate absolute; or

Of Estates, Successors, Beings, &c.

or for increasing it; as where an estate for years is made lease for life, &c. or it may be for diminishing, by confirming the estate of a tenant at a less rent; but the prior estate must not be void; for a confirmation will have no effect upon an estate that is void in law, or determined. *Co. Lit.* 301.

If tenant for life grant a rent-charge, &c. to one and his heirs, he in reversion is to confirm it; otherwise it is good only for the life of tenant for life. *Lit.* 529.

If a lease be void against a remainder-man, it cannot be set up by his acceptance of rent; and if only voidable, yet acceptance of rent is not of itself, a confirmation. *Cowp. Rep.* 482. *Dougl. Rep.* 50.

No man has a lease of 2000 years as a lease, but only as a term to attend the inheritance. *Cowp. Rep.* 595.

Though deed be in form of release, it may, if there be sufficient words, operate as a grant, in order to make it good. *Cowp. Rep.* 599.

Lease by husband of wife's estate, only voidable. *Dougl. Rep.* 53. n.

Under-lease not an assignment. *Dougl. Rep.* 57, 184.

When whole term is made over, it is an assignment, and not an under-lease. *Dougl. Rep.* 187. n.

What cannot be supported as an assignment, shall be good as an under-lease. *Dougl. Rep.* 188. n.

Lease from 1st June, for three years, commences 2 and expires 1. *Losl's Rep.* 276.

Lease is a contract between landlord and tenant, whereby both are bound in mutual stipulation, and it can be no lease unless some person

son agreed to hire the premises demised, and to pay the rent; for a sale and a lease, are the same species of contract. 1 *Burr. Rep.* 122.

The word "term" may signify the time as well as the interest. 1 *Burr. Rep.* 285, 286.

Lease for seven, fourteen, or twenty-one years, as lessee shall think proper, is a good lease for seven years, whatever may be its validity as to the two other terms. 2 *Burr. Rep.* 1034.

Lease may commence at one day, in point of computation, and at another in point of interest. 2 *Burr. Rep.* 1190.

Lease for above three years, may be by a note in writing, without deed. 2 *Wils. Rep.* 27. *Gilb.* 235, 236.

Lease by testamentary guardian of infant, void. 2 *Wils.* 135.

Two leases of same term and lands by two jointenants may be good. 2 *Wils.* 1.

Husband possessed of term for years in right of his wife, as executrix of her former husband may convey same. 3 *Wils.* 277.

3. Bargain and sale is a deed or instrument, whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another: it is called a real contract, upon a valuable consideration, for passing of lands, tenements and hereditaments, by deed indented and inrolled. Also 'tis where a recompence is given by both the parties to the bargain; as of land for money, and money for the land, &c. 2 *Inst.* 612. *Lil. Abr.* 206.

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Where

Of Estates, Ancestors, Heirs, &c.

Where lands are bargained and sold for money only, the deed is to be inrolled: if in consideration of money and natural affection, &c. the estate will pass without it. And a bargain and sale passes the freehold of the lands, also reversions, remainders, &c. without livery and seisin; and a rent may be reserved out of it by deed inrolled: but if the bargain and sale be for money, it cannot be to one man to the use of another, but to the bargainee only. If one bargain lands of which another person is in possession, and claims title to, the deed is not good; unless the bargainor enter, and deliver the deed on the ground, &c. and hath good title: and a bargain and sale by a man who is not in possession, nor receives the rents, tho' in consideration of money, will not be good, without livery. *Lev. 56. 8 Rep. 93. Dy. 155. Lil. Abr. 209.*

There must be a good consideration given, or at least said to be given for lands in these deeds; and for a competent sum of money, is a good consideration, but not the general words for divers considerations, &c. If money is mentioned to be paid in a bargain and sale, and in truth, no money is paid; some of our books tell us this may be a good bargain and sale, because no averment will lie against that which is expressly affirmed by the deed; except it comes to be questioned whether fraudulent or no. Altho' a deed expresses a consideration upon a purchase, by *style* this will be no proof upon a trial, that the money was actually paid; but it is to be made out by witnesses. *Co. Rep. 176. 11 Rep. 25. Dy. 169. Style 370.*

The

The deed of bargain and sale being made on good consideration, neither the death of the bargainor or bargainee before inrollment hinders the passing of an estate; but until the deed is inrolled, the estate of freehold is in the bargainor; and the bargainee cannot bring an action of trespass before entry had, tho' he may surrender, alien, &c. and a bargainee before inrollment, 'tis said, may suffer a recovery: also he shall have rent which grows due after the date of the bargain and sale, and before the inrollment. *Hob. 136. Cro. Jac. 52. Vent. 361. Sid. 310.*

This inrollment is to be in one of the courts at *Westminster*, or in the county where the lands lie, before the *Custos Rotulorum*, justices of peace, &c. and the deeds are to be thus inrolled within six months by statute, to be accounted at twenty-eight days by the months: tho' this extends only to bargains and sales of inheritance and freehold; and not to a bargain and sale of leases for years, &c. which are good though not inrolled, nor by deed indented, &c. If several seal a deed of bargain and sale, and but one acknowledge it, and thereupon the deed is inrolled; this is a good inrollment within the statute 27 *H. 8. c. 16. Style 462.*

In case two bargains and sales are made of the same lands to two several persons, and the last deed is first inrolled; if afterwards the first deed is also inrolled within six months, the first buyer shall have the land; for when the deed is inrolled, the bargainee is seised of the land from the delivery of the deed, and the inrollments shall relate to it. The statute of inrollments says that the estate shall not vest, except the deed be inrolled; and then it vests presently, by the sta-

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tute of uses, and settles *ab initio*. *Wood's Inst.* 260. *Darv. Abr.* 696.

Not only lands, but rents, advowsons, tithes, &c. may be granted by bargain and sale, in fee-simple, fee-tail for life or years; but commonly it is of land in fee-simple. If a tenant in tail grants all his estate to a man and his heirs; the grantee hath but an estate for the life of tenant in tail: and where tenant for life bargains and sells his land, by deed inrolled, 'tis a forfeiture of his estate. *Rep.* 176. *Lit.* 613. 4 *Leon.* 251.

The deed of *bargain and sale* is to be inrolled.

4. Fine and recovery. A fine is a final agreement or conveyance upon record, for the settling and assuring of lands and tenements, acknowledged in the King's Court by the cognisor to be the right of the cognisee. Or it is a covenant made before justices and entered of record, for conveying lands, tenements, or any thing inheritable, to cut off all controversies.

Anciently a fine was a determination of a real controversy; but now it is generally a feigned action upon a writ of covenant, &c. and supposes a controversy where in reality there is none, to secure the title that a man hath in his estate against all men; or to cut off intails, and with more certainty convey the title of lands, &c. and pass the inheritance thereof, tho' it be not controverted, to whom we think fit. And a fine may be levied on a writ of right, &c. in any real action: and being levied in the King's court, therefore it binds women covert, being parties, and others whom ordinarily the law disables to act. *West. Symb.* par. 2.

There

There are four sorts of fines: a *fine sur cognizance de droit come ceo, &c.* single, which is the principal, and surest kind of fine, it giving present possession to the cognisee, without writ of execution: a *fine sur done, grant and render*, called a double fine, wherein the cognisee after a release and warranty to him by the cognisor, grants and renders back the lands, &c. and this render is sometimes of the whole estate, and sometimes of a particular estate with remainders over; also sometimes with reservation of rent, and clause of distress, &c. A *fine sur cognizance de droit tantum*, which is a fine executory, generally used to pass a reversion; and sometimes made use of by tenant for life, to release to him in reversion: when a reversion is passed by it, then it is expressed in the fine that the particular estate is in another, and the cognisor willeth that the cognisee shall have the reversion, or that the land shall remain to him after the other estate is spent. A *fine sur concessit* is where the cognisor is seised of the lands, and the cognisee hath no freehold therein, but it passeth by the fine; it is used to grant away estates for life, or years, and is also executory, so that the cognisee must enter, or have a writ of *habere facias seisinam* to obtain possession, if the party to whom the estate is limited, be not in possession at the time of levying the fine. 2 Inst. 513. 2 Rep. 56. 5 Rep. 38. Plowd. 268.

Fines are likewise with proclamations or without; a fine without proclamation is a fine at the Common law; and the fine with proclamations is termed a fine according to the statutes, and this is the best sort, and most used: and if there be error in the proclamations, it shall be a good fine at Common law. And fines are now

levied in the court of *Common Pleas* at *Westminster*, on account of the solemnity thereof, ordained by the statute of 18 Ed. 1. They may be acknowledged before the lord chief justice of C. P. as well in as out of court; and two of the justices of the same court have power to take them in open court: also justices of assize may do it; but they do not usually certify them without a special writ of *dedimus potestatem*: and by commissioners in the country fines may be taken impowered by *dedimus potestatem*, one whereof named 'tis said must be a knight: these commissions, general and special, issue out of the Chancery. Stat. 18 Ed. c. 7. 1 R. 3. p. 4. 4 H. 7. c. 24. 32 H. 8. c. 36. 3 Rep. 86. 2 Inst. 512. Dy. 224.

A person seised of an estate in fee-simple, fee-tail general or special, tenant in remainder, or reversion, may levy a fine: so may tenant for life, to hold to the cognisee for the life of tenant for life; but tenant for years cannot levy a fine of his term. These fines may be levied of all things *in esse* at the time of the fine, which are inheritable; though not of things uncertain, or of lands held in tail by the king's letters patent, &c. And lands bought of divers persons, by several purchasers, may pass in one fine, to save charges; but the writ of covenant must be brought against all the vendors, and every vendor warrant against him and his heirs: and on a fine uses may be raised and created, &c. declared by indentures before or after levying the fine. Also by fine, almost any kind of contract may be made and expressed. 3 Rep. 77. 5 Rep. 124. Co. Rep. 76.

And there are in every fine several parts.

1. An original writ, usually a writ of covenant.

2. The

2. The *licentia concordandi*, or king's licence, for which the king hath a fine, called the king's silver. 3. The concord itself, containing the agreement between the parties how the land, &c. shall pass, being the foundation and substance of the fine: and 'tis said, the concord being the complete fine, it shall be adjudged a fine of that term in which the concord was made, and the writ of covenant returnable. 4. The note of the fine, or abstract of the original contract, left with the chirographer. 5. The foot of the fine, which includes all, setting forth the day, year and place, and before what justices the concord was made, &c. of this there are indentures made forth in the office, which is called the ingrossing of the fine. In the levying of fines, if either of the parties cognisors die, after the king's silver is entered, the fine shall be finished, and be good: 'tis otherwise if they die before, it shall avoid the fine. *Rep.* 76. *2 Inst.* 511, 517. *Co. Lit.* 9. *Salk.* 341.

If there be want of an *original, or not writs of covenant for lands in every county; or if there is any notorious error in the suing out a fine, or any fraud or deceit, &c. Writ of error may be brought to make void the fine, but a fine shall not be reversed for small variance, which will not hurt it: nor is there occasion for a precise form in a render upon a fine, because it is only an amicable assurance upon record. No single fine may be with a remainder to any other person not contained in it: though if *A.* levy such a fine to *B.* who by the same concord grants and renders back the land again to *A.* for life, remainder to his wife for life, remainder to *A.*

* See *Coke's Law Tracts*, 253. in notes.

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and his heirs; this will be a good fine. *Ca. Lit. 9. 5 Rep. 38. Plowd. 248.*

A feme covert levying a fine with her husband, is to be examined in private whether she does it voluntarily, and not by compulsion, for without her voluntary consent the fine cannot pass: and women coverts, and infants ought to be cautious in levying fines; if a married woman levy a fine with her husband of her own lands, she cannot reverse it during the husband's life, or after his death; and if it be of her jointure, she will lose her thirds: fines levied by infants must be reversed during their minority, or they are good against them. *Affis. pl. 53. 50 Edw. 3. Dy. 359.*

After a fine is passed, the privies in blood, as the heirs of the cognisor, are barred presently; but strangers to the fine have five years to enter and claim their rights, &c. And the like time have infants after their full age; feme coverts after the death of their husbands; prisoners after their enlargement; persons out of the realm after their return, &c. But if a feme covert dies while she is covert, being no party to the fine; or a person in prison dieth whilst there, or one beyond sea at the time of the fine levied never returns; in these cases the heir is not limited to any time. A future interest, as in remainder or reversion, cannot be barred by a fine, until five years after it comes in being; and where there is no present nor future right to the lands, only a possibility at the time of levying the fine, &c. a person may enter and claim when he will. *Plowd. 367. 1 Rich. 3. c. 7. 2 Inst. 519. 2 Rep. 93. T. Raym. 151. 10 Rep. 49.*

If

If a fine according to the common law, be now levied, he that hath right may make his claim or entry, &c. at any time to prevent the bar: by statute, claim or entry to avoid the bar of a fine, is to be made in five years; and no entry or claim, shall make an avoidance of any fine with proclamations, unless an action be commenced within one year after such entry, and prosecuted with effect. *Co. Lit.* 254, 262. *Stat. 1 R. 3. c. 7.* *4 Ann. c. 16.*

An estate must be divested and put to a right, before a fine bars; when it is turned to a right, and then there comes a fine, and non-claim, 'tis a perpetual bar. One that at the time of the fine levied, had not any title to enter, shall not be barred thereby: this in case of a future interest, not turned to a right, wherein a man is not bound to claim; and extends not to tenant in tail, barring his issue. If a person doth levy a fine of my land, while I am in possession, this fine will not hurt me: nor when a stranger levies a fine of my lands let to a tenant, if the tenant pays me his rent; and if there be tenant in tail, remainders in tail, &c. and the first tenant in tail bargains and sells the land by deed inrolled, and levies a fine to the bargainee; here the remainders in tail are not bound, tho' five years pass without claim; for the law adjudges them always in possession. *9 Rep.* 106. *32 H. 8. c. 36.* *Carter* 82, 163.

If tenant in tail be disseised, and the disseisor levy a fine, and five years pass, without claim, that shall bind his issue. And a fine will bar the heirs in tail; but not the remainders or reversions; but recoveries bar them all. *Cro. Eliz.* 896.

In

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In proving a fine, it must be shewn, that the conusor was in possession, or had received rent. *Cowp. Rep. 622.*

A fine and the deed to lead the uses, are to be considered as one conveyance. *Dougl. Rep. 45, 277.*

Actual entry necessary to avoid a fine. *Dougl. Rep. 483, 485.* not, if without proclamations. *2 Will. 45.*

Feme conusor died day after caption, and after tort, but before return of covenant, if praefine paid, not to be stopped at king's silver. *Barnes. 214.*

One conusor dies year after caption, fine stopped at king's silver, ordered to pass. *Barnes. 215.*

King's silver should require no other affidavit, than that all parties were living when praefine paid. *Barnes. 215.*

Fine acknowledged in *South Carolina*, cannot pass without oath before one of the judges of the *Common Pleas*. *Barnes. 216.*

Fine *sur concessit* and a fine *sur connazance*, &c. cannot pass in one fine, but caption being for both, one may be struck out. *Barnes. 116.*

How fine by infant trustee, or by order of the court of *Chancery*, to pass. *Barnes. 217.*

How to pass fines taken at *Hamburg*. *Barnes. 217.*

Fine ordered to pass on affidavit of due acknowledgement thereof, by tradesman; same being taken before an attorney and him, and the latter dying without making such affidavit. *Barnes. 217.*

Caveat too late after return of writ of covenant, and entry of such fine at king's silver. *Barnes. 218.*

King's

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King's silver is post fine or fine for licence to agree. *Barnes*. 218. 2 *Wils.* 115.

Cognisor suggested to be insane, produced and examined in court, appeared of good capacity, fine not vacated. *Barnes*. 218.

Commissioner attending and making oath, that fine in *Italy* was duly acknowledged, though not signed by cognisors, fine allowed. *Barnes*. 219.

Fine was vacated upon motion, in that the cognisor died, before return of writ of covenant. *Barnes*. 220, 221. 2 *Wils.* 115. *Barnes*. 218.

Teste and return of writ of entry refused to be amended. *Barnes*. 17.

Fine amended by deed of uses. *Barnes*. 24.

To alter a fine of *Trinity Term*, to the next *Michaelmas Term*, refused. 3 *Wils.* 250. 2 *Bl. Rep.* 777. S. C.

Fine levied *tempore Annae reginae*, amended in name of parish. 3 *Wils.* 58.

Fine taken in *Scotland*, where no attorney resident or near the place, allowed, though affidavit of due acknowledgement thereof, not made by an attorney. 2 *Bl. Rep.* 880.

Term of fine not amended living the parties. 2 *Bl. Rep.* 788.

Not christian name of plaintiff. 2 *Bl. Rep.* 816.

Bill in *Chancery* filed, no claim to avoid a fine. 2 *Bl. Rep.* 993.

Return day of writ of covenant not amended. 2 *Bl. Rep.* 1013.

Fine not amended by encreasing number of acres. 2 *Bl. Rep.* 1202.

Fine acknowledged *de bene esse*, by feme covert without her husband. 2 *Bl. Rep.* 1205.

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A *recovery* is *fiat iuris*, or a formal act by consent, used where a man is desirous to cut off an estate-tail, &c. and for the better assurance of land, and tenements, upon which uses may be limited and raised. It is much of the same nature of a fine, though better in regard it bars remainders and reversions: and recoveries are much favoured by the law, many of the inheritances of the kingdom depending upon these assurances. § Rep. 40.

This common recovery supposes a recompence in value, to all persons that lost the estate: and it is either with single, double or treble voucher. The recovery with single voucher is used to bar the tenant in tail, and his heirs, of such estate-tail which is in his possession, with the remainders depending upon it, and the reversion expectant thereon which others have; and of all leases and incumbrances derived out of such remainder or reversion. The recovery with double voucher is to bar the first voucher, and his heirs, of every estate at any time in him, or any of his ancestors, whose heir he is of such estate; and all others of right to remainders and reversions dependant and expectant upon the same, and all leases and incumbrances derived out of them; also it will be a bar of the estate whereof the tenant was then seised in reversion or remainder, &c. The recovery with treble voucher is to make a perpetual bar of the estate of the tenant, and of every such estate of inheritance that at any time had been in the first or second vouchee, or their ancestors, whose heirs they are; and as well of every reversion thereupon depending, as of all leases, estates, charges and incumbrances, derived out of any reversion or remainder.

Ce.

Co. Lit. 102. *10 Rep.* 37. *2 Rol. Abr.* 204.

Noy 81.

In prosecuting recoveries there is a colourable suit; wherein there is a demandant, and a tenant, and one called to warrant upon a supposed warranty, who is the common vouchee; the demandant is supposed to come into court, and the common vouchee to make default; and withdraw in contempt of the court; whereupon judgment is had, that the demandant, against whom there is no defence, shall recover the land. And in a recovery with single voucher, the writ of entry must be brought against tenant in tail in possession, and he is to vouch the common vouchee: but if the recovery be with double or treble voucher, then by fine, feoffment or lease and release, &c. you are to discontinue the estate, and make a tenant of the freehold of the land; and thereupon bring the writ against that tenant, and he is to vouch the tenant in tail, and he the common vouchee; and then judgment is given for the demandant against the tenant, and for the tenant to recover in value against the vouchee, and so the first vouchee against the second, &c. as the recovery is brought. *10 Rep.* 39, 42. *Co. Lit.* 224. *Wood's Inst.* 252.

To every recovery there must be a good tenant to the *precipe*, or it will be void: a recovery has been held good where a stranger that had nothing in the land was made tenant to the *precipe* with the tenant in tail; for the supposed recompence in value shall go to him who lost the estate. If tenant for life, and he in remainder in tail suffer a common recovery, and both vouch the common vouchee; it is no good recovery to bar the issue in tail, because
he

he in remainder was not tenant to the *præcipe*, being not in possession. But where there is tenant for life, the remainder in tail, with reversion, or remainder in fee; if the tenant for life is impleaded by agreement, and he vouch the tenant in tail, and he vouch over the common vouchee; this will bar the remainder and reversion in fee, though he in remainder or reversion did never assent to the recovery. 2. *Lil. Abr.* 425. *Vent.* 358. *Co. Rep.* 15. 3 *Rep.* 60.

In case tenant for life surrenders to him in remainder in tail, he may bind the remainder and reversion expectant upon his estate: though if tenant for life alone suffer a recovery; without the consent of him in remainder, the recovery is void. And here if tenants in tail after possibility of issue extinct, tenants by the curtesy, or for life, suffer a common recovery by covin, without the assent, and to the prejudice of him in remainder or reversion; not only the recovery shall be void, but it will be a forfeiture of the estate of such tenants. *Co. Lit.* 362. *Stat.* 14 *Eliz.* c. 8.

It was formerly a question, if there was a tenant in tail, remainder for years, and tenant in tail suffers a recovery, whether the lease for years be barred or not? because it was insisted, that no recompence can go to this, being a chattle: but the court adjudged, that this lease should be barred, and so the constant experience had been. 2 *Lev.* 30. *Mod. Rep.* 110. A recovery suffered by tenant in tail, after he himself hath made a lease of the lands, or entered into a statute, will make the lease or charge, that before was voidable, good against the issue in tail, and him in remainder or reversion; and the

the recoveror shall hold the lands charged, and subject to the lease made by tenant in tail. *Co. Rep.* 25.

A common recovery is the best assurance a man can have, so as to sell or dispose of his estate as he pleases; except an act of parliament. But a recovery bars only where there is a privity in law; as the issue of tenant in tail, and he in remainder, reversion, &c. Strangers are not barred by a recovery and non-claim, as they are by a fine: nor shall it bar the heir, who claims as a purchaser, and not by descent; or when there is an executory estate, which depends upon a contingency; nor a rent granted by the tenant in tail, &c. And recoveries may be avoided if suffered by fraud, to deceive purchasers, &c. like any other fraudulent conveyance. *3 Rep.* 5. *Carter* 53. *Lutw.* 1224. *Cro. Eliz.* 792.

These recoveries are suffered in the *Common Pleas*, by the tenants and vouchers personally in court, or by attornies; and sometimes by attorney in the country on a *dedimus potestatem*, &c. And most errors in a recovery are amendable the first time after the recovery had; but for gross error in the proceedings in matter of substance, a recovery may be made void, either by writ of error, or by pleading; or by motion in court, praying a *vacat* of the judgment. *8 Rep.* 162. *Co. Lit.* 104.

As a fine and recovery are a bar, and dock the estates before mentioned; so by indentures to lead the uses thereof, new estates and intails are limited and created subject to farther fines and recoveries.

Not so much certainty of description required in a recovery as in another action. *Cowp. Rep.* 349, &c.

A secret feoffment under a naked possession, is not sufficient to support a common recovery by tenant in tail in remainder. *Cotep. Rep.* 702.

The rise, nature, and history of common recoveries, discussed at large. *1 Burr. Rep.* 115. *Wilf.* 73.

Construction of stat. 14 *Geor.* 2. chap. 20. respecting recoveries. *1 Burr. Rep.* 116, 2, 1027.

On writ of error to reverse a recovery, there must be a *sci. fa.* against the terre-tenants. *1 Burr. Rep.* 301.

Judgment in common recovery, shall not relate to first day of term, if such relation would make it previous to return of writ of entry. *Bl. Rep.* 222. *2 Burr. Rep.* 1005. *Bl. Rep.* 251.

Recovery amended. *Barnes*, 20, 21, 22, 23, 24. *2 Bl. Rep.* 747, 1065. *3 Wilf.* 154.

Recovery suffered of advowson in gross, and acre of land upon writ of entry *sur disseisin in le post*, good. *2 Wilf.* 116.

Vouchee dies before return of summons, recovery void. *Wilf.* 35, 42.

Not good if he dies on return day, being Sunday. *Bl. Rep.* 196, 527, 532. *3 Burr. Rep.* 1595.

Recovery found by special verdict without writ of seisin awarded, bad, and no bar. *Wilf.* 55.

Recovery amended in return of writ of seisin. *2 Wilf.* 2.

Amendment of recovery, by inserting one county for another. *2 Bl. Rep.* 874.

Return of writ of summons will not be enlarged. *2 Bl. Rep.* 1201, 1223, 1224.

Christian name of vouchee amended. *2 Bl. Rep.* 1230.

A surrender is a deed or instrument testifying that the particular tenant, for life or years, of lands and tenements, doth yield up his estate to him who hath the immediate reversion or remainder, that he may have the present possession thereof; and where the estate for life or years may merge or drown, by the mutual agreement of the parties. *Co. Lit.*

337.

The usual surrender at common law is of two sorts, a surrender in deed or by express words in writing, when the words of the lessee to the lessor prove a sufficient assent to give him his estate back again; and a surrender in law, being that which is wrought by operation of law, and not actual; as if lessee for life or years take a new lease of the same land during their term, it will be a surrender in law of the first lease: and in some cases this surrender is of greater force than the surrender in deed; for if a man make a lease for years to begin at a day to come, the future interest cannot be surrendered by deed, because there is no reversion, wherein it may drown; but if the lessee before the day takes a new lease of the same thing, 'tis a good surrender in law of the former lease. Also this kind of surrender by taking a new lease holds good, though the second lease is for a less term than the first, &c. *Co. Lit.* 338. *5 Rep.* 11.

10 Rep. 67. *Perk.* 601.

To make a good surrender in deed of lands, the following things are required; the surrenderor is to be a person able to make the surrender, and the surrenderee capable to receive and take it; the surrenderor must have an estate in possession of the thing surrendered, and not a future right; and the surrender is to be made

to him that hath the next estate in remainder or reversion, without any estate coming between; the surrenderee must have a higher or greater estate in his own right, and not in the right of his wife, &c. than the surrenderor hath in the lands, so that the surrenderor's estate may be drown'd therein; there is to be privity of estate between the surrenderor and surrenderee; and the surrenderee must be sole seised of his estate in remainder, not in jointenancy; and agree to the surrender, &c. *Co. Lit.* 338.

2 Rol. Abr. 494. *Noy's Max.* 73.

A surrender may be of any thing grantable, either absolute or conditional; and may be made to an use, being a conveyance tied and charged with the limitation of an use: but it may not be of an estate in fee; nor of rights or titles only to estates for life or years; or for part of any such estate; nor may one termor regularly surrender to another. If lessee for life surrender to him in remainder for years, &c. it is a void surrender: though it has been held, that if a tenant for life, and one in remainder for life, surrender to him in reversion, it shall pass as several surrenders; first of him in remainder to the tenant for life, and then by the tenant for life to the reversioner. *Park. Sett.*

675. *Cro. Eliz.* 688. *Leon.* 303. *Popb.* 137.

There are surrenders of copyhold or customary estates; and where things will not pass by surrender, the deed may enure to other purposes, and take effect by way of grant, having sufficient words. *Park.* 624.

6. Gift and Grant. A deed of gift is an instrument that passeth lands or goods; and is applied to two kinds of conveyances, for either of those purposes, where there is no bargain and sale.

sale. And a gift is of a larger extent than a grant, extending to things moveable and immoveable: though as to things immoveable, when taken strickly, it is applicable only to lands and tenements given in tail; but gifts and grants are often confounded. *Wood's Inst.* 263.

In this deed the person who gives is called the donor, and he to whom the thing is given is called the donee, and in like manner there is grantor and grantee, &c. The deed must have apt words to describe and set forth the persons of the donor and donee, that they be duly named, and also the thing given, &c. and all necessary circumstances, as sealing and delivery, and livery of seisin are to be observed: and if a deed of gift, or any other deed, be procured by duress or imprisonment of the party that makes it, for this it may be made void. *Perk. Sect.* 16. *F. N. B.* 202.

A deed of gift is good without any consideration; and a gift may be upon condition: but great care must be taken that there be no fraud in the case; for if a deed of gift and conveyance of lands is made with intent to defraud a purchaser upon good consideration, as against such purchaser it shall be void, and parties justifying the same to be *bonâ fide* made, shall forfeit a year's value of the lands, &c. And so it is, if any deed of gift or grant, be made to defeat creditors of their just debts, &c. The statute makes the deed void, against such creditors; but not against the party himself, his executors or administrators, against whom it remains good. *Co. Lit.* 351. *Cro. Jac.* 271. *Stat.* 13 *Eliz.* c. 5. perpetuated by *Stat.* 29 *Eliz.* c. 5. 27 *Eliz.* c. 4. perpetuated by *Stat.* 39 *Eliz.* c. 18. *Sect.* 32.

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The words give and grant; in deeds of gift, &c. of things which lie in grant, will amount unto a grant, a feoffment, a gift, release, confirmation or surrender, and may be pleaded, as a gift, or grant, release, &c. at the election of the party: and the deeds of gift and grant are said to be alike in nature, and equal in power. *1 Inst.* 301.

Grant signifies a conveyance in writing of incorporeal things, not lying in livery; as of reversions, advowsons, tithes, services, rent, common in gross, &c. And grants are made by such persons as cannot give but by deed. *West. Symb.* 234.

A grant shall be taken most strongly against the grantor, and for the grantee: And the grantee himself is to take by the grant immediately, and not a stranger, or any one *in futuro*. The use of any thing being granted, all is granted necessary to enjoy such use; and in the grant of things, what is requisite for the obtaining thereof is included: so that if timber trees are granted, the grantee may come upon the grantor's ground to cut and carry them away. Where the principal thing is granted, the incident shall pass with it; but not the principal by the grant of the incident. *Co. Lit.* 56, 152. *2 Inst.* 309. *Plowd.* 15.

If lands are granted by deed, the houses which stand thereon will pass; for houses and mills pass by the grant of all lands, as land is the most durable thing on which they are built. By grant of all the lands the woods will pass: if a man grants all his trees in a certain place, this passeth the soil; tho' an exception of wood extends to the trees only, and not the soil of the land: and trees in boxes, &c. pass not by the grant of land, because they are separated from the

the freehold. When a first description of lands in a grant is true, if the second be false, this grant is good; but if the first be false, notwithstanding the second be true, nothing will pass by it. *4 Rep.* 86. *5 Rep.* 11. *3 Rep.* 10. 6 *Mod.* 170.

Grants are to be of things certain; and the law will not allow of a grant of imperfect interests, or of such as are merely future: in all grants there must be a foundation of interest, or they will not be good; the thing granted must be what is grantable; and it is to be granted in that manner the law requires; also there must be an acceptance of the grant, by him to whom made. One attainted of treason or felony may make a grant; and be good against all persons but the king, and the lord of whom the lands are held: grants made by persons *non sana memoria* are voidable by their heirs, &c. but good against themselves; and though infants, and feme coverts are not capable to be grantors, yet they may be grantees, subject to disagreement of the husband, and the infant at his full age. *Perk. Sett.* 15, 26, 31. *Co. Lit.* 2.

Deeds of grant may be void by uncertainty, impossibility, being against law, &c. But where the grant is impossible, according to the letter, the law may make such construction as by possibility it may take place: and constructions of grants shall be agreeable to the intent of the parties. *Co. Lit.* 183, 313. *Co. Rep.* 46.

A grant may be presumed from great length of time. *Cowp. Rep.* 215.

7. A lease is a demise or letting of lands, tenements or hereditaments to another, for term of life, years, or at will, for a rent reserved.

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All leases, interests of freehold, and terms for years in lands, &c. are to be in writing, or shall have no greater effect than estates at will; except leases not exceeding three years from the making, &c. And if the substance of a lease be put in writing, and signed by the parties, though it be not sealed, it shall have the effect of a lease for years, &c. Articles with covenants to let and make a lease of lands, for a certain term, at so much rent, have been adjudged a lease: and a licence to occupy, and take the profits, &c. which passeth an interest, amounts to the same. 29 Car. 2. Co. Lit. 43. Cro. Eliz. 486. 3 Salk. 223.

Leases may be for life or years, of any thing that lies in livery or grant; but a lease for life, which requires livery of seisin, cannot be made to commence at a day to come; for by the common law an estate of freehold must take effect presently, and livery cannot be made to a future estate: though a lease for life in reversion is good. Leases for years should be made of such lands, &c. whereunto the lessor or landlord may come to distrain; not of incorporeal inheritances; and a lease for years may commence from a day past, or to come, as *Christmas* next, three or ten years after, or after the death of the lessor, &c. and be good. This lease may have a certain commencement and determination, and have all the usual ceremonies, &c. A demise having no certain commencement, is void. Co. Lit. 47. 5 Rep. 94. Plowd. 273. Vaugh. 85.

A man seised of an estate in fee-simple, in his own right, of any lands or tenements, may make a lease of it for what lives or years he will; and one, that is seised of an estate-tail in lands,

lands, may grant a lease of it for his own life, but not longer; except it be by fine or recovery, or lease warranted by the statute 32 H. 8. c. 36. by which statute, tenants in tail are enabled to make leases, not exceeding three lives, or twenty-one years, of lands commonly let to farm, under the accustomed yearly rent, &c. He that is seised of an estate for life, may make a lease for his life, according as he is seised; and if tenant in tail, or for life, make any lease generally, it shall be construed for his own life. Where a lease for years is made by tenant for life, it will be good as long as the estate for life doth last; and if lessee for years makes a lease for life, it may be enjoyed accordingly, if the term of years lasts so long; but if he gives livery and seisin upon it, this is a forfeiture of the estate for years; a person possessed of lands for years, may make a lease of all the years, except one day, or any short part of the term; it is to be granted for a less term than the maker hath in the premises, for if all the estate is granted, it is an assignment. *Co. Lit. 42. Wood's Inst. 266, 267.*

Leases may be made for any number of years, months or weeks; and be from week to week, month, &c. for three or four years. If one makes a lease for a year, and so from year to year, it is a lease for two years; and if from three years to three years, it is a good lease for six years; and in case 'tis made for a year, to hold from year to year, so long as both parties agree 'till six years expire, this is a lease for the six years, but determinable every year, at the will of either party; but if 'tis for a year, and so from year to year, until six years determine, it will be a certain lease for six years. A man

makes a lease for years to one person, and afterwards makes a lease for years to another of the same lands; the second lease shall be good for so many years thereof as shall be to come after the first lease is ended. *Co. Lit. 6. 6 Rep. 35. 6 Mod. 215. Noy's Max. 67.*

A person out of possession cannot make a lease of lands, without entering and sealing the lease upon the land: and when a lease is sealed by the lessor, though the lessee hath not sealed the counterpart, action of covenant, may be brought upon the lease against the lessor. The lessee is to enter on the premises let; and such lessee for years is not in possession, so as to bring trespass, &c. until actual entry; but he may grant over his term before entry. On a lease for life or years, the lessee hath but a special interest in the timber-trees, as things annexed to the land, to have the mast and shade for his cattle, &c. and when they are severed from the land, the lessee's interest is determined, and the lessor may take them as part of his inheritance: but if an house falls down by tempest, &c. the lessee may take the timber to re-edify it, &c. *Dalish. 81. Co. Lit. 46. 4 Rep. 62. 11 Rep. 81.*

The lessor making a lease may not reserve rent to any other but himself, his heirs, &c. and if he reserves a rent to his executors, the rent shall be to the heir, as incident to the reversion of the land: if a lessor dies before the day of payment of rent, the heir shall have it; but if it becomes due in the lessor's life-time, and be not received, it shall go to his executors. The lessor may distrain in the tenements letten for the rent, &c. Also land leased is subject to those lawful remedies which the lessor provides for

for recovery of his rent, possession, &c. into whose hands soever the land comes. *Co. Lit.* 41. *Raym.* 213. 10 *Rep.* 127, 129. *Gre. Jac.* 300.

If any lessor tenant for life dies on the day rent is made payable to him, by lease determining at his death; the executors, &c. in action of the case may recover from the under-tenants the whole; or if he die before such a day, a due proportion of the rent: and when demises are not by deed, landlords shall have satisfaction, for the use of what the tenants hold. Where tenants or lessees of lands, &c. held at a rack-rent, being in arrear one year's rent, leave the same uncultivated or unoccupied, two justices of peace, at request of the landlord, may go upon and view the premises; and if on notice fix'd on the most notorious place, and a second view, the rent be not paid, the lease shall become void: but these proceedings are examinable by the next justices of assize, who may order restitution, &c. Tenants holding over lands, after the end of their leases, or on notice of quitting the premises, after the time appointed, shall pay double rent. *Stat. 4 Geo. 2. c. 28.* 11 *Geo. 2. c. 19.*

Tenant in tail, remainder to the defendant in fee, lease for years, and dies without issue a week before the day of payment of the half year's rent; the lessee at the day pays all the half year's rent to the defendant; the executor of the tenant in tail brings his bill for apportionment of the rent. By the lord chancellor *Hardwicke*: This point has never been determined; but this is so strong a case, that I shall make it a precedent. There are in it two grounds for relief in equity; the first arises on

on the statute of 31 Geo. 2. the second arises on the tenant's having submitted to pay the rent to the defendant; the relief arising upon the statute is either from the strict legal construction, or equity founded upon the reason of it: and here it is proper to consider what the mischief was before the act, and what remedy is provided at common law; if tenant for life, or any who had a determinable estate, died but a day before the rent reserved on a lease of his became due, the rent was lost, for no one was intitled to recover it; his representatives could not, because they could only bring an action for the use and occupation; and that would not lie where there was a lease, but debt or covenant; nor could the remainder-man, because it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy. But there are two descriptions of the person, to whose executors the remedy is given, in the preamble, it is one having only an estate for life; in the enacting part, it is tenant for life; now tenant in tail comes expressly within the mischief. I do not know how the judges at Common law would construe it, but I should be inclined in this court to extend it to them; I should make no doubt, were this the case of tenant in tail after possibility of issue extinct, for he is considered in many respects as tenant for life only; he cannot suffer a recovery; he may be enjoined from committing waste, such as hurts the inheritance, as selling timber; tho' not for committing common waste, being considered as to that as tenant in tail; were it the case of tenant for years determinable on lives, he certainly must be included within the act, tho' it says only tenant for life: it would be playing

ing with the words to say otherwise; the cases shew the necessity of construing this act beyond the words; tenant in tail has certainly a larger estate than a mere tenant for life, for he has the inheritance in him, and may when he pleases turn it into a fee; but if he does not, at the instant of his death he has but an interest for life: such too is the case of a wife tenant in tail *et provifione mariti*; upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this, *aquitas sequitur legem*: where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases; if it does so as to maxims of the Common law, why not as to the reasons of acts of parliament? nay, it has actually done so, on the statute of forcible entry; upon which, this court grounds bills, not only to remove the force, but to quiet the possession; that act requires a legal estate in possession; this court extends the reason to equitable interest; but I ground my opinion in this case upon the tenants having submitted to pay the rent; he has held himself bound in conscience to pay it, for the use and occupation of the land the last half year; he paid it to the defendant, which he was not bound to do in law; and in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity intitled to it. The division must be that prescribed by the statute, and then the plaintiff is intitled to such a proportion of the rent as accrued during the testator's life, and accordingly it was decreed. *Burn's Just. quarto* 313.

The remedy given by Stat. 4 Geo. 2. c. 28. §. 1. seemeth not altogether adequate to the

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the evil: for three reasons: 1. Because such action is certainly tedious and expensive. 2. It is uncertain when the action is over, whether the tenant will be able to pay. 3. What is chiefly wanted, namely, putting the landlord into possession, is not obtained by such action, but for that he shall be still to seek; a more short and easy method of ousting the tenant in his possession, seemeth more eligible in the like cases. *Ibid.* 311.

This clause also proceedeth upon a supposition, which perhaps may not be true, namely, that the tenant is a man of substance; it is more likely, that if he were able to live elsewhere, he would not chuse to hold over under such circumstances, nor perhaps would the landlord want to be rid of him: the putting him out of possession by some expeditious and easy method, seemeth the more adequate remedy in this case also in like manner as is provided in the case where the tenant deserteth the premises. *Ibid.* 312.

A man demiseth lands for term of years, &c. the law intends a covenant that the lessee, on paying his rent, shall quietly enjoy the land during the term. And in case a lessee for years loses his lease, if it can be proved there was such a term let to him by lease, and that it is not determined, he shall not lose his term; so it is of any other estate in lands, if the deed that created it be lost; for the estate in the land is derived from the party that made it, and not from the deed otherwise than instrumentally and declarative of the mind and intent of the party, &c. *Co. Lit.* 384. 2 *Lik. Abr.* 152.

No tenant shall take leases of above two farms in any town, village, &c. nor hold two, unless he dwell in the parish, under penalties and forfeitures by statute 25 *Hen.* 8. c. 13.

See

See more of leases and tenants, under the heads, *Action of waste, Ejectment, Distresses and Replevins*, also *Tenures*.

8. A mortgage is defined to be a pawn of lands or tenements for money borrowed, to be the creditor's for ever, if the money be not repaid at the day agreed: but on the mortgagor's paying the interest of the money, mortgages are continued a long time, without disturbing the possession or parties. *Lit.* 332.

These mortgages are, usually made by lease for a long term of years, lease and release, assignment, &c. and therein is contained a *proviso*, that if the money be paid on the day, the deed to be void: until failure in payment, the mortgagor generally holds the lands; and if failure be made, and the mortgagee doth enter into the land, yet the mortgagor hath an equity of redemption, and may call the mortgagee to account: but the mortgagee may bar the equity of redemption, and oblige the mortgagor to pay what is due, or be foreclosed; which the court of chancery will order, in convenient time. A feoffment in fee, or lease for life or years, may be made with proviso, that if the feoffor or grantor, their heirs or executors, pay to the feoffee or grantee, &c. such sums of money at a certain day, then the feoffor or grantor may re-enter; and this hath been a common condition in a mortgage, or of an estate upon condition in a deed: in the former case of mortgages, the mortgagor keeps possession till failure; but here the mortgagee has possession presently, and 'till payment, and is in the mean time called tenant in mortgage, &c. *Co. Lit.* 205.

A mortgagee is esteemed in possession, on executing the mortgage; and if the mortgage-money be not paid, whereby the land is forfeited,
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he may bring ejectment, without actual entry. The interest in the lands mortgaged is, in law, in the mortgagee, before forfeiture; he hath as it were purchased the same upon a valuable consideration, as the law will intend; and although the mortgagor may redeem, it is not certainly known whether he will do it or not: and if he do not redeem the land, the estate is absolute in the mortgagee; but still subject to an equitable right of redemption by the mortgagor. *2 Lil. Abr. 203, 204.*

If persons having once mortgaged lands mortgage the same a second time, without discovering the first mortgage, they shall forfeit their equity of redemption, and the second mortgagee shall have the power of redeeming, &c. And where any action of ejectment shall be brought by a mortgagee for the recovery of the possession of mortgaged lands, and no suit is depending for foreclosing or redeeming such land; if the person that hath right to redeem shall, pending the action, pay the mortgagee, or bring into court all the principal money and interest and costs, it shall be a full satisfaction of the mortgage: and the mortgagee shall reconvey the land, and deliver up all deeds, &c. And on a bill in equity to compel the defendant having right to redeem, to pay the mortgage-money, or on default to be foreclosed, &c. the court upon the defendant's application may make orders therein before the cause is brought to hearing, &c. *Stat. 4 & 5 W. & M. c. 16. 7 Geo. 2. c. 20.*

The mortgagor's heir, who is interested in the condition, may pay the money and save the forfeiture; and so may executors, &c. unless it be where no time is limited for payment, and the

the mortgagor, having time during his life, do not pay it: in this case, his heir or executors shall not be received to pay the money after his death. The executors are to have money due on mortgages, if a mortgagee in fee dies before the day of payment; except the heir be particularly named, as the executors do more represent the testator than the heir: and mortgages have been looked upon as part of the personal estate, if it be not otherwise declared by the mortgagee in fee; also personal estate of a mortgagor shall be applied to discharge the mortgage, where there are personal assets to pay all legacies. *Co. Lit.* 206, 210. *2 Vent.* 348. *2 Salk.* 450. *Eq. Cas. Abr.* 269. *pl.* 2. *Gilb. Lex. Praet.* 315. *15 Vin. Abr.* 441. *pl.* 18. *2 Wil. Rep.* 455.

An old mortgage assigned to another ought to be taken as a new mortgage from the time of the assignment: and when a mortgage is forfeited, the mortgagee shall have interest for his interest; so shall an assignee for all interest, from the time the mortgage was assigned. For where the mortgagee assigns his mortgage, all money paid by the assignee, if due at that time, shall be accounted principal, to the mortgagor, whenever he comes to redeem: but an agreement made at the time of a mortgage will not make future interest principal; the interest must be first due, before any agreement concerning it may make the same principal. *Chanc. Rep.* 218, 258. *2 Salk.* 449.

Where there are mortgages upon an estate intended to be sold, assignments are to be made in trust, from the mortgagees, &c. to the purchaser; reciting the mortgages, and assigning them in trust to attend the fee, which is conveyed absolutely to the purchaser by lease and release. A purchaser

purchaser coming in upon a valuable consideration, purchasing a precedent incumbrance, shall protect his estate against any person that hath a mortgage subsequent: and it hath been allowed in equity, that a third mortgagee may buy in the first incumbrance to protect his own mortgage, &c. *2 Ventr. 338.*

Mortgagee purchaser within 27 *Eliz. c. 4.* and therefore voluntary settlement made by mortgagor after marriage, is void as against him. *Cowp. Rep. 478.*

Mortgagor cannot dispute mortgagee's title. *Cowp. Rep. 601.*

Ejectment will lie by mortgagee, against tenant, under lease from mortgagor, subsequent to mortgage, without notice to quit. *Dougl. Rep. 21.*

Mortgagee after giving notice of mortgage to tenant in possession under lease prior to mortgage, is intitled to rent in arrear at time of notice, as well as rent afterwards accrued, and may distrain for it, after notice. *Dougl. Rep. 279.*

Mortgagee of term cannot be sued as assignee, till in actual possession. *Dougl. Rep. 455.*

Mortgagee as well as mortgagor, in possession gains settlement by forty days residence. *Dougl. Rep. 632.*

Mortgage is charge upon land, will be liable to debts, go to executors, and pass by a will not made according to statute of frauds and perjuries. *2 Burr. Rep. 978.*

Where there are two or more mortgages to same person, court will not compel mortgagee to accept of one without the other. *2 Bl. Rep.*

72.

Mortgagee

Mortgagee for lives cannot compel mortgagor to fill them up as they drop, but may do it himself. *Wilf.* 34.

Mortgage of goods and choses in action, is fraudulent, as against creditors, if the goods, &c. be not delivered to the mortgagee. *Wilf.* 260.

See ejectment upon mortgages, ante, p. 116.

9. An assignment is the setting over or transferring the interest a man hath in a lease or other thing to another. And assignments may be made of lands held in fee, for life or years; of an annuity, rent-charge, judgment, statute, &c. but as to lands they are usually of leases and estates for years.

Where tenant for years assigns his estates, no consideration is required; for the tenure being subject to payment of rent, &c. is sufficient to vest an estate in the assignee: in other cases, some consideration must be paid. And if lessee for years assigns all his term in his lease to another, he cannot reserve a rent in the assignment; for he hath no interest in the thing, by reason of which the rent reserved should be paid; and where there is no reversion, there can be no distress: but debt may lie upon it as on a contract. *Mod.* 263. *Rep. Ld. Abr.* 99.

Although a lessee make an assignment over of his term, yet action of debt lies against him for the rent, by the lessor or his heir, (not having accepted rent from the assignee:) but where a lessee assigns his term, and the lessor his reversion, the privity is determined, and action of debt doth not lie for the reversioner against the first lessee. On an assignment of the lessee, before acceptance of rent from the assignee, the lessor may charge either the lessee or assignee with

with the rent at his election; tho' if he once accepts the rent from the assignee, knowing of the assignment, he cannot afterwards bring debt against the lessee for rent. As the rent issues out of the land, the assignee generally who has the land, and is privy in estate, is debtor in respect thereof: yet if an assignment be made by an assignee, to any one whatever, the first assignee is not suable for any rent: here, if he be accepted by the lessor, the admission of one assignee is the admission of twenty. *Moor* 472. 3 *Rep.* 23, 32.

An assignee is he who hath the whole estate of the assignor; and there is assignee in deed, being such person to whom a lease or estate is assigned by deed; and assignee in law, whom the law makes so without deed; as an executor appointed by will is in law assignee to the testator: but if there be assign in deed, the assign in law is not allowed. Where a grant is made to a man and his heirs, though the word *Assign* be not expressed, he may assign at his pleasure; for the word *Assign* is included in heirs: and assignees may take advantage of forfeitures on conditions, when they are incident to the reversion, as for rent, &c. and regularly every assignee of the land may have advantage of inherent covenants; also assigns are bound by such covenants, as a covenant to repair, &c. for the benefit of the estate, although not named. *Co. Lit.* 215. *Dy.* 6. *Andr.* 2. *Cro. Eliz.* 552.

But when a covenant concerns a thing not in being at the time of the demise, as to make a new edifice, &c. the assignee is not bound, except he be named in express words; nor is he when named, if the thing to be done, doth not concern the thing demised; or in contracts merely

merely personal. A lessee covenanted for himself and his assigns, to rebuild a house before such a time, which he did not do, but after the time expired he assign'd the term; and it was held that this covenant would not bind the assignee, because it was broken before the assignment. *Roll. Abr.* 915. *Plowd.* 284. *Salk.* 199.

Bonds and debts, &c. are said to be assigned; but must be sued for in the assignor's name; bills of exchange are assignable by indorsement, whereon the assignees may sue and recover in their own names, by stat. 3 & 4 *Ann. c. 9.* perpetual by 7 *Ann. c. 25. s. 3.* If a man makes an assignment, and yet keeps possession of the land, &c. it shall be adjudged fraudulent. *F. N. B.* 98.

10. A will is the declaration of a man's mind and intent, as to the disposition of his lands or goods, of what he would have done after his death. The common law calls that a will, when lands and tenements are devised; and where it concerns chattels alone, it is termed a testament. *Co. Lit.* 111.

In a will made of goods there must be an executor named; but not of lands only, without goods, for executors have nothing to do with the freehold. If lands are given by will, 'tis called a devise, and goods and chattels a legacy; and there is this diversity between lands and goods given by a will, that when lands are devised in fee, or for life, the devisee shall enter without any appointment of others: but in case of goods, there must be the assent of the executor, &c. Where lands or tenements only are devised by will, the will ought to be proved in the chancery;

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ry; if of goods and chattels it must be done in the spiritual court: and a will both of lands and goods may be proved in that court. *Co. Lit.*

111. *Swinb.* 24.

Quere, how far a court of common law hath a concurrent jurisdiction with the ecclesiastical courts, and court of equity, in matters of legacy. *Cowp. Rep.* 287.

Devise originally bad, can never afterwards be made good. *Lofft's Rep.* 161.

Devise of lands differ extremely from wills.

1 *Burr. Rep.* 429.

Power of devising ought to be favoured; it's rise and progress. 1 *Burr. Rep.* 418.

Witness shall not intitle himself to a devise, by his own subscription, which, at time of subscribing, he could not have proved by his examination. 1 *Burr. Rep.* 423.

If land be charged with legacies by a proper devise, legacies may be given, altered or revoked, by an un-attested subsequent will. 1 *Burr. Rep.* 424.

Where a devise or a legacy, is in *terrorem* only. *Com. Rep.* 726, 734, 738. *Prec. in Chan.* 350, 562. *Vent.* 199. *Mod. Rep.* 308. *Chan. Cas.* 58. *Vern.* 19. 2 *Vern.* 293, 416, 452.

See Legacies.

All persons, who have a sole estate in fee simple of any lands, tenements or hereditaments, may give and devise the same by last will and testament, at their free will and pleasure; so as such persons are not feme coverts, infants, persons *non sane memoria*, &c. whose wills shall not be good in law: and by the stat. 29 *Car.* 2. c. 3. perpetuated by 1 *Jac.* 2. c. 17. s. 5. for prevention of frauds, all devises of lands or tenements

nements are to be in writing, signed by the deviser, or some by his express directions, in the presence of three credible witnesses, at least; and no devise in writing shall be revoked, but by some other will in writing, or by cancelling the same by the testator himself, or by his direction, &c. And where nuncupative wills, by word of mouth, are made for the disposition of chattels above 30 l. value, they must be declared in presence of three witnesses, bid to bear witness, in the last sickness of the party, &c. and the substance of them must be reduced into writing, within six days after the making, &c. Lands entailed are not deviseable by will; only fee-simple lands, and goods and chattels. 32 H. 8. c. 1. 29 Car. 2. c. 3. 3 Rep. 31. Co. Lit. 111, 115.

The construction of wills is more favoured in law than any other deed or conveyance, to fulfil the intent of the testator; because the testator is supposed to be *inops consilii*, and a in hurry, and a devise is not a conveyance by common law, but by the statute: the devises before the statute were by custom, and as custom enabled men to dispose of their estates contrary to the common law; so it exempted this kind of conveyance from the regularity and propriety required in other conveyances; and thus it came to pass that wills upon the statute, in imitation of those by custom, gained such favourable construction. Words in wills are always construed according to the intention of the parties that make them, as near as can be collected; but the words and intent must agree with the law; and if the words are insensible and repugnant, they are void, 3 Salk. 127, 128. Co. Lit. 25. Plowd. 162.

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An infant makes his will for lands, and when of age he declares it as his will, yet it is void; but an infant at fourteen years old may make a will of his goods and chattels. Although a feme covert cannot regularly make any will; the husband may bind himself by covenant or bond to permit his wife by will to dispose of legacies, &c. and this will be such an appointment as he will be bound to perform; yet 'tis properly no will, nor ought to be proved in the spiritual court: of things in action, or what she hath as her own as executrix, by her husband's consent, 'tis said she may make a will in law; if in other cases she disposes of any thing by the agreement of the husband, the property passes from him to her legatee, and it is as the gift of husband. A person, when he makes his will ought not only to have his memory to answer questions, but to have perfect mind and memory: and one must have as good disposing memory when he revokes his will, as when he makes it: but if there be any disagreement of witnesses therein, their testimony is to be preferred, which depose that the testator was of sound memory, for the support of the testament. *Co. Lit. 89. Cro. Car. 219. Cro. Jac. 497. Mod. Rep. 211. Swinb. 67.*

If a man bid another make his will, and before it is done he dies, the will is not good: though if it be drawing up in his presence, it may be good for the devises finished. A will was made since the statute 29 Car. 2. by which lands were devised, but no name subscribed to it, being sealed in the presence of three witnesses, was adjudged a good will; the will being written by the party himself, and his name in the will, which was held a sufficient signing: and a will

will may be good to convey lands, altho' it be not sealed; the statute of wills speaking nothing of sealing. *Plowd.* 16, 343. 3 *Lev.* 1. 2 *Danv. Abr.* 542.

A testator devised by will all his lands, tenements and estate whatsoever, whereof he should be possessed at the time of his death; and after this he purchased lands, &c. and it was held, that a devise of personal things was good, tho' the testator had them not at the time of the will; but a chattel real, as a lease for years, doth not pass: and a devise of lands is not good, if the testator at that time had nothing in them. By devise of all a man's lands and tenements, all the lands he hath in possession, and also in reversion do pass: but where a person, having lands in fee, and other lands for years, devises all his lands and tenements, the fee-simple lands only pass; tho' if he hath only leases for years, by such devise, those leases shall pass to the devisee. *Goulsh.* 93. *Salk.* 237. 2 *Danv. Abr.* 527. 11 *Mod.* 106, 121, 148. *Fitzgib.* 233. *Holt.* 750.

The devise of all a man's inheritance carries a fee-simple: also lands given to a person to dispose of at pleasure, makes a fee. If there are no words of inheritance in a will, the devisee hath no more than an estate during life: devise of all a man's estate, &c. passeth an estate for life only, not a fee by implication. So if one wills, that another shall have his lands in D. and says not how long, &c. But if a man devises land by will, paying 20*l.* the devisee hath a fee-simple, altho' the money be not a hundredth part of the value of the land: and yet if the devise be to a person, to the intent that he out of the profits pay so much to one, and so much

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to another, this is said to be but an estate for life. *Hob. 75. 2 Nels. Abr. 837, 745. 4 Shep. Abr. 40. Dyer 342. Bridgm. Rep. 138.*

A devise to a man and his heirs male makes an estate tail; tho' such a gift in any common conveyance would be a fee-simple, is not being said of what body. Devise to one who is heir for life, remainder in contingency, &c. is good; and in these cases of executory devises, the estate descends till the contingency happens: by way of future executory devise, a devise to an infant *in ventre sa mere* shall take place. If a term is devised to A. for life, with remainder to B. this remainder is good by way of executory devise, for the residue of the term. And a term may be devised to one for life, with remainders to several others for life, when all the persons are *in esse*: though if the devise in remainder be to a person for life, who is not then in being, no limitation of a term may be beyond such estate; as to another and his issue, &c. *Co. Lit. 27. Lutw. 798. T. Raym. 28, 164. Sid. 451.*

In wills a devise may be to one, to the use of another; and the use shall be executed; and devises must be of a thing, and to a person certain. Land given to a man who shall marry my daughter, or to a man and his children, &c. is certain enough: but a condition in a will, that one shall not marry such a person, &c. is unlawful and void: if a legacy or portion is given to a woman, provided she marries not without consent of another, it is only *in terrorem*; unless the portion on such marriage be limited over to some other person. A man devises 1000*l.* to his daughter, if she attain 21 years, or at that age; if she dies before, the legacy is
gone

gone: here in case the legacy had been, to be paid her at her age of 21, then it is *debitum in presenti & solvendum in futuro*, and her administrator, &c. shall have it, if she die before. If where a legacy is given generally by will, the legatee dies before due, it is extinguished: and legacies are * not recoverable at common law; but in the ecclesiastical court, chancery, &c. 2 Leon. Swinb. 293. Mod. Rep. 300. Lil. Abr. 457: 2 Ventr. 342.

Land may pass under the word *legacy*, as well as money. Dougl. Rep. 40. Burr. Rep. 271.

Pecuniary legacy cannot be limited after a dying without issue. 1 Burr. Rep. 273.

Legacy is a vested interest, when time annexed to payment only, and not to legacy itself. 1 Burr. Rep. 227.

See *Devises*.

The last will made by a man shall stand in force, and there can be but one will to take effect, though there may be several codicils to a will. If in a will there are two devises of the same thing, the last devise takes place: and as a latter will doth overthrow a former, so the latter part of a will overthrows the former part of it. But where a devise of lands was to one in fee, and in the same will the same lands were devised to another, this 'twas said made them jointenants; and if a devise is to one person in fee, and to another for life, or years, both devises may stand. Co. Lit. 112. Plowd. 341. 3 Leon. 11. See 3 Mod. 204, 207.

A will hath no force 'till after the death of the testator; but then without any further

* See Stra. Sel. Cas. of Evid. 59. & 11 Mod. 91. pl. 15. contra.

grant,

grant, livery, &c. it gives and transfers estates, and alters the property of lands and goods, as effectually as any deed executed in a man's lifetime; and hereby discentments may be prevented, estates in fee-simple, fee-tail, for life, years, &c. may be made: and he that takes lands by devise, is in the nature of a purchaser. *Lit.* 167.

Lands may be released to one and his heirs by will; but a man cannot release a debt or duty by his will, tho' he may give and bequeath it. *Ventr.* 39. Devises of lands are deemed void against creditors upon specialties, &c. *Stat.* 3 *W. & M.* c. 14. perpetuated by 6 & 7 *W.* 3. c. 14.

Meaning of former words contained in a will, may be restrained by subsequent words. *Say. Rep.* 238.

If testator's intention cannot be answered, unless devisee take a fee, a fee will pass, altho' the words of the will would not be sufficient to pass such estate by a common deed. *Say. Rep.* 195.

If surrender of copyhold to use of will, the copyhold will pass by any words in will amounting to an appointment under surrender. *Say. Rep.* 195.

One duplicate of will in testator's custody, another not, cancelling former, effectually cancels latter. *Cowp. Rep.* 49.

Marriage and birth of child, revocation of will, if of real estate. *Dougl. Rep.* 39.

Republication of will requires same solemnities, as original publication. *Dougl. Rep.* 36.

Intention of testator to be found out, from the whole of a will. *Loffi's Rep.* 97. and to be followed. *2 Burr. Rep.* 1106.

See

See Stat. 25 Geo. 2. c. 6. entitled, 'An act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils, concerning real estates, in that part of *Great Britain* called *England*, and in his majesty's colonies and plantations in *America*,' whereby devisees, creditors and legatees, are made competent witnesses to wills of real estates.

Estates in goods and chattels, with some things thereto relating, and how they may be released, I shall treat of under,

1. Bills of sale of goods.
2. Gifts of goods and chattels.
3. Agreements, contracts and covenants.
4. Bonds and obligations for money.
5. Letters of attorney to receive debts.
6. Releases of debts and actions, &c.

1. A bill of sale is an instrument used for transferring the property of goods and chattels: and it can never be without a consideration.

A person may at any time sell his goods, even though an execution be coming out against him; unless there is a private trust between the parties, and the writ of execution is delivered to the sheriff, &c. And where a bargain is, that one shall give me so much for a horse, and he gives one shilling or a penny in earnest, which I accept, this is a perfect sale. *Noy Max. 87.*

Where one agrees for goods sold, the buyer must not carry them away before paid for; except a day of payment is allowed him by the seller. The seller of things is to keep them for

for a reasonable time, for delivery; but where no time is appointed for the delivery thereof, or for payment of the money, it is generally implied that delivery be made immediately; and payment on the delivery. And on sale of goods in a shop, &c. the seller may not bring an action for the money agreed, till the goods are delivered. *Noy 87. 3 Salk. 61.*

It hath been held, that on sale of goods, if earnest be given to the seller, and part of them is taken away by the buyer, he must pay the residue of the money upon fetching away the rest, because no other time is appointed; and the earnest binds the bargain, and gives the buyer a right to demand the goods, but a demand without paying the money is void: and if the buyer doth not take away the goods, and pay the money, the seller ought to require him so to do; and then if he doth not do the same in convenient time, the bargain and sale is dissolved, and the seller may dispose of them to any other person. *Salk. 113.*

A sale of goods upon a *Sunday*, tho' in a fair or market, will not alter the property: and in markets, all contracts for any thing sold there, to make them binding, are to be made as follows: the sale is to be in a place that is open, and in a proper place for such goods; it must be a sale for valuable consideration, and the buyer is not to know that the seller hath a wrongful possession; the sale not to be fraudulently betwixt two, to bar another; there is to be a sale and a contract, by persons able to contract, and the sale may not be in the night, but between sun and sun; and toll must be paid, where required by statute, &c. Also there are toll-takers or book-keepers, who enter the names

names of buyers and sellers of horses, &c. which are to be rid or stand in the open or fair market one hour; and all the parties to the contract must be present with the horse: the sellers shall likewise produce vouchers of the sale to them, &c. *2 Inst.* 713. *5 Rep.* 83. *Stat.* 2 & 3 P. & M. c. 7. 31 *Eliz.* 12. The buying of cattle, corn and victuals, by the way before brought to a fair or market, &c. is called forestalling, and punishable by imprisonment, loss of goods, &c. *5 & 6 E. 6. c. 14.* perpetuated by *13 Eliz. c. 25.*

By statute, a contract for the sale of goods for 10*l.* or upwards, shall not be good, except the buyer receive part of the goods sold; or gives something in earnest to bind the bargain; or some note thereof to be made in writing, signed by the party to be charged with the contract, &c. And where contracts are not to be performed in a year, they must be in writing, or no action can be brought on them; so that a contract for goods under 10*l.* value, if not to be had in a year, must be in writing, or shall be void: but if no day is set, or the time is uncertain, &c. they may be good without. *29 Car. 2. c. 3.* perpetuated by *1 Jac. 2. c. 17. s. 5.*

If a man affirms things sold are of such a value, when they are not, this is not actionable; tho' it is, if he actually warrants them: but where one warrants any thing sold, after the time of sale, it is not good; for 'tis to be at the time of the sale to be binding. *Cro. Jac.* 4, 386.

A person recommending a stranger to a tradesman, who thereupon sells goods on trust to such stranger; this by the law of merchants may

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may make the recommender answerable, *Ibid.*

1. See *Ld. Raym.* 224. 2 *Ld. Raym.* 1085.
12 *Mod.* 250. *Bat. Abr.* 75, 76.

2. A gift of goods is made either by deed, by word, or in law: and all goods and chattels personal may be given without deed, except in some special cases. *Perk.* 57.

But a general gift of all a man's goods without any exception, though this be by deed, it is liable to suspicion as fraudulent, to deceive creditors: and therefore whenever any gift shall be made, in satisfaction of a debt, it is good to make it in a publick manner before neighbours; that the goods and chattels be appraised to the value, and the gift expressly made in satisfaction of the debt; and that on the gift of the goods the donee take possession of them, &c.
4 *Rep.* 80. *Hob.* 230.

As to gifts by word, if a man intending to give a jewel to one, say to him, here I give you my ring, with the ruby in it, &c. and with his own hand delivers it to the party; it would be a good gift, notwithstanding the ring should bear any other jewel, being delivered by the party himself to the party to whom given. Here a gift of any thing without consideration, will be good; but it is revokable before the delivery to the donee of the thing given: and in case I give to you one of my horses in my stable, there you shall have your election to chuse which you will. *Bac. Max.* 87. *Jenk. Cent.* 109. *Co. Lit.* 145.

The gift in law is when a man is married to a woman, the law gives all the goods of the wife to the husband by the marriage; and if a person be made executor of a will, on his taking upon him the executorship, the law gives and trans-

transfers the property of the testator's goods to such executor: though in these cases, it is as if were conditional; for the husband is liable to the debts of the wife, and the executor to the debts of the testator. *Co. Lit.* 351.

It is the same where one takes my goods as a trespasser, and I in action recover damages for them, the law gives him the property of the goods, he having paid for them. *2 Shep. Abr.* 266.

Agreement is the mutual consent of parties, or joining together of two or more minds, in any thing done, or to be done. A contract is a bargain between two persons, where one thing is given for another, which is called *quid pro quo*; and if there be not one thing for another, or some consideration, it is a nude contract and void in law. A covenant is an agreement made by deed in writing, between two or more, to do or not to do some act agreed upon betwixt them. *Terms de Ley* 32, 459.

Agreements are either executed already at the beginning, or executory, to be performed *in futuro*; and are governed by the intention of the parties: they ought to be perfect, full and compleat, so as to be executed with a recompence; or give an action or other remedy for it. An agreement without satisfaction is as nothing; and a forced agreement of the party is accounted no agreement; therefore he that did agree to the thing shall not be compelled to perform it. *Plowd.* 290. *2 Mod.* 8. *Cre. Car.* 193. *Lil. Abr.* 48.

Any thing under hand and seal, which imports an agreement, will amount to covenant; and a *proviso* by way of agreement amounts to covenant. And a covenant is either in fact, or
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in law : in fact is that which is expressly agreed between the parties, and inserted in the deed ; and in law is that covenant, which the law intends and implies, though it be not expressed in words. A servant covenants and agrees to serve me a year, and I covenant to pay him a sum of money for it ; here he may have an action against me, although he do not serve me ; but then I may oblige him to serve out the time. *Lev. 155. Co. Lit. 204.*

A covenant is no duty 'till broken : in covenants the last words, that are general, shall be expounded by the first words which are special and particular : and if some covenants in a deed are good and lawful, and others not ; those against law are void, and the other shall stand good, *2 Ventr. 218. Plowd. 287. 11 Rep. 27.*

There can be articles of agreement made, to be performed only by the parties ; or by them and their executors, &c. wherein both of them are obliged to do something, according to the matter agreed upon.

Agreement tho' not prohibited by positive law, nor adjudged illegal in the law books, may nevertheless be void, if against principles of morality, or sound policy. *Cowp. Rep. 39.*

The rule in *pari delicto, potior est conditio defendentis*, does not hold in the first sort of prohibitions in respect of agreements, which is to protect weak or necessitous men from being over-reached, but the above rule does not hold in the second sort of prohibitions respecting them, which is founded upon reasons of public policy. *Cowp. Rep. 200. See 792.*

Agreement to pay money to assignees of bankrupt, upon Certificate being allowed, whereby

whereby creditor is induced to sign, is void under stat. 5 Geo. 2. chap. 30. sect. 1. *Dougl. Rep. 695.* on. *gild. 511. 523. 524. 525. 526. 527.*

Mercantile agreements ought to have a liberal construction. *Dougl. Rep. 277.*

4. Bond or obligation is a deed in writing obligatory, whereby one doth bind himself to another, under his hand and seal, to pay a sum of money, or do some other act: a bond contains an obligation with a penalty, *£s.* and a condition, which expressly mentions what money is to be paid, or other thing to be performed, and the limited time for performance thereof, for which the obligation is peremptorily binding. And a bond differs from a bill, which is generally without a penalty or condition, tho' a bill may be obligatory. *Co. Lit. 172.*

A bond or obligation may be made from one to one, or two, three or more; or be from two persons or more, to one, two, three, &c. If a bond hath not a date, or hath a false or impossible date, if it be sealed and delivered, it is a good obligation from the delivery: and if one binds himself to pay twenty pounds, but doth not say when it shall be paid, the bond is good, and money due presently. Also in case *A.* binds himself to *B.* in thirty pounds to be paid to *A.* whereas it should be to *B.* the obligation will be good, and the *Solvendum* void. *2 Rep. 5. Co. Lit. 108; 109. 3 Lev. 21. 137.*

All conditions of bonds must be to do things lawful and possible: and when the matter or thing to be done, or not to be done by a condition, is unlawful or impossible, or the condition is repugnant, insensible or incertain, the condition is void, and in some cases the obligation likewise. And if a thing be possible at the

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time of making the obligation; and afterwards becomes impossible by the act of God, or of the law, or of the obligee, the obligation is discharged: but sometimes an obligation may remain single, where a condition is impossible, &c. and if money be not paid according to the condition, the obligation becomes single. 10 Rep. 120. Dy. 51. Cro. Eliz. 780. 2 Lil. Abr. 252.

A condition of a bond to do any act evil in itself, is void: bonds made by infants, feme coverts, &c. are not good; and if made by women, where prevailed upon by flattery, &c. they may be relieved in Chancery. Obligations by duress are void; so are bonds concerning buying and selling offices; made to avoid the debt or duty of others, by fraud; obtained by gaming, &c. by divers statutes. 1 Rich. 2. c. 13. 5 & 6 Edw. 6. c. 16. 13 El. c. 5. perpetuated by 29 El. c. 5. 16 Car. 2. c. 7. Lutw. 180. 484. 487. 2 Mod. 54. 279. Salk. 344. Skin. 572. 8 Mod. 57. 187. 10 Mod. 336. 337. 12 Mod. 3. 336. 540. 2 Ed. Raym. 1034. 1035. Stra. 495. 2 Stra. 159. Com. Rep. 4. Stat. 9 Ann. c. 14. 2 Stra. 1048. 1249. 2 Geo. 2. c. 28. 10 Geo. 2. c. 19. 28. 12 Geo. 2. c. 28. 13 Geo. 2. c. 19. 18 Geo. 2. c. 34. 25 Geo. 2. c. 36. perpetuated by 28 Geo. 2. c. 19. 30 Geo. 2. c. 24.

And bonds made for more than 5*l.* per cent. per annum interest, are void as usurious; and the receiver shall forfeit treble the value of the money lent. But it is not usury if the interest be higher, where possibly both principal and interest are in danger, upon a contingency, or casualty; or if there is a hazard that one may have less than his principal: and if a person se-

cure

cure both interest and principal, if it be at the will of the party who is to pay; it is no usury. So where a man is to pay a large sum by way of penalty, and in lieu of damages, for non-payment of the principal debt; when he might repay the principal at the time agreed, and avoid the penalty, &c. *Stat. 12 Ann. c. 10. 2 Inst. 89. Cro. Jac. 268, 677. Show. Rep. 8. Lut. 273.*

A bill obligatory written in a book, with the party's hand and seal to it, is good: and if a bill runs, I have received of A. B. the sum of twenty pounds, which I promise to pay, &c. Or, I owe to him 20*l.* or had of him that sum, to be paid at, &c. or if the bill be, I shall pay to C. D. 10*l.* &c. these and the like are good bills. *Cro. Eliz. 613. 2 Rol. Abr. 146.*

Intention of parties to bonds, is to be regarded, in construction of their conditions. *Say. Rep. 244.*

Penalty of bond not always saved, though performance of one part of a disjunctive condition, be rendered impossible by the act of God. *Say. Rep. 244.*

If obligor undertakes for the act of a stranger, penalty of bond is not saved by the refusal to do the act. *Say. Rep. 187.*

If obligor undertake for resignation of a living, it is incumbent upon him to procure acceptance of resignation by ordinary. *Say. Rep. 187.*

If condition of bond be, that apprentice shall not absent himself from his master's service, whole penalty may be recovered in case apprentice do absent himself. *Say. Rep. 116.*

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If condition of bond be to pay divers sums of money by instalment, action lies upon first failure of payment. *Say. Rep.* 30. *Bul. Ni. Pri.* 168. *Wils. Rep.* B. R. 80.

If condition of bond be general, sufficient to plead performance generally; but if special performance, same must be pleaded in words of condition. *Say. Rep.* 317.

Bond for performance of covenants, only security to extent of penalty. *Dougl. Rep.* 49, 50.

Evidence of acknowledgement of debt by obligor, not sufficient to support action on bond, conditioned for payment of money, but execution must be proved. *Dougl. Rep.* 216, 217.

Condition of bond to render account in writing of all monies received; if obligor neglect to pay them over, the condition thereof is thereby broken. *Dougl. Rep.* 381.

Bond for cohabitation with a woman seduced by obligor, and for maintenance after his death void in law. *1 Bl. Rep.* 517. *Per B. R.*

Bond to lady with condition to pay her an annuity in consideration of part cohabitation, good in law, conscience, and honour. *2 Wils. Rep.* 339.

Proceedings on bond for payment of money by instalments, shall not be stayed on payment of instalments in arrear. *2 Bl. Rep.* 958.

Bonds conditioned for payment of money by instalments, are within stat. 4 & 5 Ann. c. 16. *J. 12. 3 Burr. Rep.* 1370.

Execution shall not be on annuity bond and judgment for whole penalty, but only for arrears. *2 Bl. Rep.* 1111.

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Conditions of bonds are to be construed liberally in favour of obligor. *1 Will. Rep. 61.*

Twenty years without any demand, is of itself, presumption that bond has been paid. *Durnf. and East's Rep. 270.*

5. A letter of attorney is a writing authorizing an attorney to do any lawful act for another; in like manner as the party authorizing might do the same. And what a man may do by himself, he may generally do by another person. *West. Symb. par. 1.*

The nature of this instrument is to give the attorney the full power and authority of the maker, to accomplish the act intended to be performed: and sometimes these writings are revocable, and sometimes not so; but when they are revocable, it is usually a bare authority only; and they are irrevocable when debts, &c. are assigned to another, in which case that word is inserted. *Plowd. 475.*

In cases of common letters of attorney, the power given must be strictly pursued, or the act of the attorney shall be void; and a man may limit his authority as strictly as he pleases. If the attorney does less than the authority mentions, it is void; but if he doth more, it may be good for so much as he had power to do: and notwithstanding the ancient opinions for pursuing authorities with great strictness; yet in case of delivering divery and seisin of lands, they have been always favourably expounded of latter times; unless where it hath appeared that the attorney's power was not followed at all. *Co. Lit. 258. 2 Mod. 79.*

Letters of attorney are either general or special; and said to be revocable in their nature, tho' they are otherwise made; and by the

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death of the party giving it; the power given by letter of attorney generally determines.

8 Rep. 82. *but this was modified by 17 Geo. 2.*

Note; It was usual at the end of a sailor's letter of attorney to add his will, but now 'No will of any seaman contained in the same instrument, paper or parchment, with a letter of attorney, shall be good in law.' Stat. 9 & 10 Will. 3. c. 4. *sect. 6.* And further, that 'No letter of attorney made by any inferior officer or seaman in the service of his majesty, or by the executors or administrators of any such officer or seaman, to empower any person to receive any wages or allowances of money due for such service, shall be good, unless such letter of attorney be declared to be revocable by the express words thereof; and unless such letter of attorney, if made by any such officer or seaman then in the service of his majesty, be signed before and attested by the captain or commander, and one other of the signing officers of the ship to which such inferior officer or seaman belongs; or by the clerk of the cheque at some of the dock yards; and unless such letter of attorney, if made by any officer or seaman discharged from the service of his majesty, be signed before and attested by the mayor or chief magistrate of the town or place where such officer or seaman then resides; or if made by the executors or administrators of any such officer or seaman, unless such letter of attorney be signed before and attested by the minister or churchwardens (or in Scotland, by the minister and two elders) of the parish where such executors or administrators respectively reside.' Stat. 31 Geo. 2. c. 10. *sect. 21.* *ord.*

6. Re-

6. Release is an instrument extending not only to the giving up or discharging a right in lands, &c. but also to goods and chattels, and the releasing debts, duties and actions. *Lit.* 492.

Releases are likewise express by deed, or implied by law; as when an obligor in a bond makes the obligor executor, or a feme obligee takes the obligor to husband. &c. these are releases in law. A release by deed of a right or action may not be for a time; if made but for an hour, it will be good for ever: and a man cannot release a personal thing upon condition, but the condition will be void, and the release enure to him who made it for ever. If a duty be uncertain at first, to be made certain after, being in the mean time but a mere possibility, it can't be released: but a duty certain may be released before the performance of it. *Co. Lit.* 264. 8 *Rep.* 136. 10 *Rep.* 11. *Cro. El.* 386.

All debts and duties may be released, before or after due, by apt words. A release of all manner of actions bars and discharges all real, personal and mixt actions, subsisting at the time of the release, and bonds, statutes, &c. But not executions or writs of error; tho' a release of all suits, will be a bar to an execution: the release of all actions may not discharge a covenant before broken; but by release of covenants, a covenant not broken may be released. Release of all quarrels, &c. amounts to a release of all actions. *Lit.* 406. *Co. Lit.* 285, 292. *Rep.* 112. 4 *Rep.* 63.

By a release of all debts, debts upon specialties, executions, &c. are discharged: and a release of all duties discharges all personal actions,

judgments, executions and obligations; but release of all dues will not bar a writ of account, there being nothing due before account made up. A release of all actions may be a good bar in account. By release of all demands, all rights and titles to lands, conditions before broken or after covenants broken, rents, annuities, debts, duties, contracts, obligations, recognizances, statutes, judgments, executions, &c. all manner of actions real and personal, are barred and discharged; for this is the best release of all, and includes in it most of the others. 2 *Rel. Abr.* 404. *Co. Lit.* 291. 8 *Rep.* 153. *Dy.* 56.

The release of all demands, altho' so extensive, is no bar in a writ of error, to reverse an outlawry, nothing being demanded by such writ: it must be released by special words. A future act may not be released by release of all demands; and a release before any rent due, of all demands that the releffor had or should have against the releffee, hath been adjudged not to release the accruing rent. An obligation subsequent is not discharged or avoided by this release: though where a man is bound in a bond to pay money at a time to come, a release before will be a good bar; as it is a debt presently, though payable afterwards. 8 *Rep.* 152. *Co. Lit.* 291. *Lev.* 99. 2 *Lev.* 210.

A release to one person, where there are several jointly bound, &c. discharges the others: and an acknowledgement under hand and seal that a debt is satisfied, is a good release of such debt. 2 *Rel. Abr.* 410. 9 *Rep.* 52.

I now come to *Tenures* and holdings of lands, by the common law, which are,

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|---|-------------------|-----------------------|
| 1. In fee-simple. | } <i>Tenant</i> } | 5. In dower. |
| 2. In fee-tail. | | 6. For term of life. |
| 3. In tail, after possibility of issue. | | 7. For term of years. |
| 4. By the curtesy. | | 8. At will, &c. |

1. *Tenant in fee-simple* is where one hath lands and tenements of inheritance, to hold to him and his heirs for ever: to have fee is to have an inheritance; and to have fee-simple implies, that it is without limitation to what heirs, but to heirs generally. And a man cannot have a greater estate. *Co. Lit. 1, 2.*

The word *Heirs* makes the inheritance: and an estate granted, to hold to a man for ever, or to him and his assigns for ever, is only for life, the words *his heirs* being wanting. A gift to one and his children, and their heirs, is a fee-simple to all jointly that are alive; though if lands be given to a man and his heir, in the singular number, it is but for life; and the heir cannot take by descent, he being but one, and therefore shall take nothing. Where lands are given or granted to a man and his successors, this creates no fee-simple; except it be to a corporation, when it doth. *Co. Lit. 8, 9.*

A fee-simple determinable upon a contingency is a fee to all intents, tho' not so durable as an absolute fee: and there are said to be three sorts of fee-simple: fee absolute to a man and his heirs for ever; fee-simple conditional, when the estate is defeasible by not performing a condition; and a qualified fee, which may be defeated by a limitation, &c. But a fee conditional or qualified

qualified are not properly fee-simple. A rent or annuity is granted to one and his heirs, this is a fee-simple personal. *Vaugh. 273. Co. Lit. 2, 18. 10 Rep. 87.*

At the Common Law, all estates were fee-simple; and all other estates are derived out of it, so that there must be a fee at last in some body: but a fee-simple cannot be limited upon a fee-simple; nor may any remainder, as it is an absolute estate, and nothing can be after it. Although fee-simple is the most ample estate, it is subject to many incumbrances, &c. *4 Inst. 266. Dy. 33.*

In pleading estates in fee-simple, it may be generally alledged; but estates-tail, &c. are to be particularly shewn. *1 Inst. 11, 303.*

2. Tenant in tail is when a man hath an estate of inheritance, limited to him and the heirs of his body begotten, or to be begotten. Here the word *Body* makes the estate-tail, which may be restrained to males or females of the body; and there must be the word *Heirs*. *Co. Lit. 20.*

All lands of inheritance, and inheritances favouring of the realty, may be entailed; rents, profits, uses, offices, &c. which concern lands, or certain places, &c. But where the grant of an inheritance is merely personal, or exercised with chattels, and not issuing out of land, no entail may be made: and a lease for years to a man and the heirs of his body, will be void, because the chattel cannot be turned into an inheritance; but it may be assign'd in trust to permit the issue in tail, &c. to receive the profits. It is incident to the estate of tenant in tail, to be dispossessible of waste; that the wife of the donee shall be endowed; and the husband of a feme

some donee be tenant by the curtesy; that the tenant in tail may suffer a common recovery; and that such tenants may levy a fine to bar issues, &c. also they may make leases according to the statute 32 H. 8. and by custom grant lands by copy, &c. *Co. Lit.* 19, 224. 4 *Inst.* 87. 10 *Rep.* 38.

The tenure in fee-tail is general, where any lands or tenements are given to a man and the heirs of his body begotten, or to a woman and the heirs of her body begotten; or it is special when lands and tenements are given to a man and his wife, and to the heirs of their two bodies begotten. In the first case whatever woman the man takes to wife, or whatever man the woman takes to husband, the issue by any of them may inherit one after another; but in the last case, none shall inherit but those that are begotten by the man and his wife particularly named. And with respect to these estates it is held, that a general tail and special tail may not be created at one and the same time; if they are, the general, which is greater, will frustrate the special. *Co. Lit.* 20, 28.

Where lands are given to the husband and wife, and the heirs of their bodies, both of them have an estate in special tail: if lands and tenements are given to a man and his wife, and to the heirs of the body of the man the husband hath an estate in general tail, and the wife an estate for life; because the word *Heirs* relates generally to the body of the husband. And if the estate is made to the husband and wife, and to the heirs of the body of the wife, there the wife hath an estate in special tail, and the husband for term of life only; the word *Heirs* relating to the body of the wife to be

be begotten by that particular husband. If an estate be limited to a man's heirs which he shall beget on his wife, it creates a special tail in the husband, but the wife will be entitled to nothing. *Co. Lit.* 22.

An estate-tail may be by implication; where a man gives lands to his son for life, and after his decease, to the issue of his body, &c. and for want of such issue, remainder over: and in this case it was held, that a recovery by the son was well suffered. Lands given to persons that are unmarried, and the heirs of their bodies, is a good estate-tail; so if given to a married man and another man's wife, for the possibility that they may intermarry. *Co. Lit.* 25. 10 *Rep.* 50. 3 *Salk.* 296.

Intails are generally created upon marriage settlements; and were introduced by the statute of *Westm.* 2. 13 *Ed.* 1. And if tenant in tail die without issue, the donor or his heirs may enter as in reversion. *Lit.* 18.

3. Tenant in tail after possibility of issue extinct is where any lands, &c. are given to a man and his wife in special tail, and either of them dies without issue had betwixt them, the survivor hath an estate in tail after possibility of issue, &c. *Lit.* 32.

None can have this estate but the donee in special tail; on a general tail it cannot be, by reason of the possibility of issue: and if the donees in special tail have issue, and the issue die without issue, so that there is none left which may inherit by force of the entail, the survivor of the donees will have an estate tail after possibility of issue. And these tenants are not punishable for waste, like unto tenants for life, &c. *Co. Lit.* 27, 29.

If

If one gives land to a man and his wife, and the heirs of their two bodies, and they live till each of them are one hundred years old, and have no issue; yet do they continue tenant in tail, for that the law seeth no impossibility of having children: but when a man and his wife are tenants in special tail, if the wife die without issue, there the law seeth an apparent impossibility, that any issue that the husband can get should inherit the estate. *Co. Lit. 28.*

Estates in tail after possibility of issue, &c. now seldom happen, such accidents being guarded against by settlements.

4. Tenant by the curtesy is when a man taketh a wife seised in fee-simple, or in fee-tail general of lands or tenements, or seised as heir-ess in special tail, and hath issue by her male or female, born alive, which by any possibility may inherit, and then the wife dies; the husband shall hold the land during his life, by the curtesy of *England*, being a privilege not allowed in any other kingdom. *Co. Lit. 29.*

If a woman tenant in tail general takes a husband, and hath issue by him, which issue dieth, and the wife also some time afterwards dies in the life-time of the husband, without having any further issue, here the husband shall be tenant by the curtesy; for though the estate tail be determined, yet the husband is intitled by the first issue before the estate was spent. And four things are requisite to estate by the curtesy: marriage, seisin, issue and death of the wife; and this ought to begin by the issue, and be consummate by the wife's death; and the estate of tenant by the curtesy should avoid the immediate descent. *Terms de Ley 206. Co. Lit.*

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Where lands descend to the wife, after issue by her, the husband shall be tenant by the curtesy: but if lands be given to a woman, and the heirs male of her body, and she hath issue by her husband a daughter, and then dies; the husband shall not be tenant by the curtesy, for this issue cannot possibly inherit the lands. *Co. Lit. 29.*

And of a bare right, title, use, or of a reversion or remainder expectant, a man may not be tenant by the curtesy; nor of a seisin in law: though of a rent in fee, or of an advowson, if the wife die before rent is due, or the church becomes void, the husband may be tenant by the curtesy; because it was out of his power to procure any other seisin. *Co. Lit. 30. F.N.B. 149.*

5. Tenant in dower is where a man is sole seised of lands and tenements in fee-simple, fee-tail general, or as heir in special tail, and marries a wife, and dies; the wife, by the common law, after the death of her husband, shall have a third part of such lands and tenements, as were her husband's, at any time during the coverture, to hold during her life, whether she hath issue by him or not: and 'tis not necessary that seisin should continue to the death of the husband; for if he aliens the land, &c. the wife shall nevertheless be endowed. *Co. Lit. 30, 31.*

A wife may have dower of the principal mesuage, (not being a castle) lands, tenements, &c. And of a third part of a reversion, expectant on a term for years, and the rent reserved thereupon; but not upon a reversion on a lease for life, &c. The wife shall have her dower, where lands were recovered against the husband,

husband, by default or covin: and it is much favoured in law, being for the benefit of widows. A wife of one *non compos*, of an idiot, outlaw, or a man attainted of felony, may be endow'd; though not of one attainted of treason, nor the wife of an alien, &c. And if a wife commit treason or felony, she shall forfeit and lose her dower. *Co. Lit. 35. 2 Inst.*

435. To entitle to dower there must be three things,

marriage, seisin and death of the husband: at Common Law, dower is assigned by the sheriff, by virtue of the king's writ; or by the heir, &c. by agreement among themselves. By statute, the widow shall immediately after her husband's death have her marriage inheritance, and remain in his chief house forty days, in which time she shall have her dower, &c. *Co. Lit. 31, 392. 9 H. 3. c. 7.*

If a woman be deforced of her dower, she shall recover damages, viz. the value thereof from her husband's death: but where the wife levies a fine with her husband, it bars dower.

13 Ed. 1. *100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.*

6. Tenant for term of life is where a man lets lands to one for his own, or another person's life; and the lessee is called a freehold tenant; but this is understood to be the least estate of freehold. *Lit. Ten. 28.*

If a man makes a grant of lands, tenements, &c. to another, and therein expresses no estate, it has been held, that the lessee or grantee has thereby an estate during life: and if a lease or grant be made to a man, during the lives of two others, and doth not say of the survivor of them: by construction he hath a freehold during the life of the survivor. Also where a man

man grants an estate, for so long as the grantee shall dwell in such a house, or any like uncertain time; the lessee hath in judgment of law an estate for life determinable, if livery be made: and he may plead, that by force thereof he was seised generally for term of life. *5 Rep. 9. Co. Lit. 42.*

A lease is made to a man and his assigns, to hold to him during life, and the lives of two other persons: here is no merger of the lives of the others; for the lessee hath but one estate, by one and the same deed, with this limitation, viz. during his and the other two lives: and though the lessee can have it no longer than his own life, yet his assignee shall have the benefit of it so long as the other two are living. But where a person seised in fee demised and granted to one, to hold to him, and also to two others for their lives, and the life of the successive longer liver; it was held, that none should take but the first person, because he was only party to the deed, and the rest not named but in the *Habendum*: so that they could not take but by way of remainder; which here could not be joint, because of the word successive, &c. nor in succession, it not being said successively, as named in the deed. *5 Rep. 13. T. Raym. 143. Hob. 313.*

The grant of a manor or lands with livery, that at the time of the lease or grant made are worth twenty pounds *per annum*, until a hundred pounds are paid; is an estate for life, determinable upon levying the money, the annual profits being uncertain: but if a man grants a rent of twenty pounds a year, until one hundred pounds are paid, there the grantee hath an estate but for five years. *Co. Lit. 42.*

If

If tenant for life shall remain beyond the seas, or elsewhere absent himself by the space of seven years together, and no sufficient proof be made of his life, in any action to be brought by the lessor or reversioner, such person shall be accounted dead: and the judges, on any such action brought, shall direct the jury to give their verdict, as if the party was dead. But if such person shall return from abroad, or be made appear to be living; he shall recover the profits of the land with interest, for the time he hath been kept out of the same. *Stat. 19 Car. 2. c. 6.*

And by a statute since made, persons in remainder or reversion of any estate, after the death of another, on affidavit in the court of chancery, that they have cause to believe such other person dead, and his death concealed, &c. may move the lord chancellor to order such person to be produced; and if he be not produced, he shall be taken as dead, and those in reversion may enter upon the estate. *6 Ann. c. 18.*

7. Tenant for term of years is when lands or tenements are let to another person for a certain term or number of years to come, and the lessee enters on the lands by virtue of this lease, then he is called tenant for term of years. *Co. Lit. 24.*

A term is granted to a man for eighty years, if he lives so long; this term determines by his death: and a lease for one thousand years is not a freehold, or of so high a nature as an estate for life. If tenant for life, and he in remainder in fee, make a lease for years by indenture, rendering rent; it is, during the life of the tenant for life, the lease of tenant for life, and the confirmation of him in remainder; and after

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the death of tenant for life, it is the lease of him in remainder: and in an action brought upon such lease, during the life of tenant for life, the declaration must be on a lease made by him only, &c. *Co. Rep.* 153. *Co. Lit.* 45. *Cro. Car.* 154. *Dy.* 235.

Where a man had a term for years in the right of his wife, made a lease thereof to commence after his death; he died, and the wife survived, and this was held good against the wife: for the husband during his life might have sold the whole term which his wife had in it, or any part of the term; but the wife shall have so much thereof as is undisposed of by the husband. If a man is seised of any estate in fee-simple, or fee tail, in right of his wife, or jointly with her; the wife is to join with the husband in leases to be good against her heirs, as is directed by *Stat.* 23 *H. 8. c.* 28. *Co. Lit.* 44, 46. *Popp.* 5.

One possessed of a term for forty years grants to another so many of the years as shall be to come at the time of his death; it is void for uncertainty: but if the land had been demised, to hold after the death of the lessor for twenty years, &c. it had been good. *Co. Rep.* 155. *2 Rep.* 36.

8. Tenant at will is where lands are let to hold at the will of the lessor; here the lessor may put out the lessee when he pleases: but if the lessee sows the land, and before the corn is ripe the lessor puts him out; yet the lessee shall have the corn. *Lit.* 63.

If a man enters into land by consent of the owner, he is tenant at will: so where a man is in possession, and has paid any rent to the landlord, tho' but a quarter's rent; and altho' there

was no agreement between the owner of the land and the tenant, this may be a good tenancy at will; for it shall be presumed the rent was received upon some private contract. *T. Raym.* 147. *2 Lil. Abr.* 151.

A lease at will ought regularly to be at the will of both parties; and the lessor and lessee, where the estate is at will, may determine the will when they please: but if the lessor doth it within a quarter, he shall lose that quarter's rent; and if the lessee doth it, he must pay a quarter's rent; he should determine his will on the very day of payment of the rent. If a man makes a lease at will, and dies, the lease is determined; and if the tenant continues in possession, he is tenant at sufferance. *Co. Lit.* 55, 57. *2 Salk.* 413. *Ld. Raym.* 707.

Words spoken off from the land by the lessor will not determine the will, until the lessee hath notice thereof; but an actual entry in the absence of the lessee will determine it. And the lessor may come upon the land, and forbid the lessee to hold any longer; or he may enter thereupon, in the presence of witnesses, and say, *I do here enter and take possession of this my land, &c.* and so oust the tenant at will. *Co. Lit.* 56, 57.

Tenant at will is not bound to repair, as tenant for years is; but if he commit voluntary waste, action of trespass may be had against him; though for permissive waste there is no remedy. *Co. Lit.* 57. *5 Rep.* 13.

But now the doctrine of tenancy at will seems almost entirely exploded, for it is held by an opinion of the first authority, that there is no such tenure subsisting at this day; for the nature of the tenure depends upon the agreement

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for payment of rent; for instance, if it be payable quarterly, the agreement is a lease for a quarter of a year, and cannot be determined by either party without a quarter's notice, and so for any other given time.

Tenants for term of life, and term of years, *vide* more of under title *Lease*.

In this place I shall take some notice of *Copyhold* and *Customary* tenures, which I shall divide into,

1. Copyhold estates held for lives.
2. Copyholds in fee, and their qualities.
3. Copyholder's widow's estate.

1. Tenant by copy of court-roll, or copyhold tenant, is such who holds lands or tenements of his lord for life, or in fee, by copy of court-roll, made by the steward of the lord's court; and a copyholder in former times had but an estate at will, in judgment of law; but now by the custom of the manor, these estates are descendible, and the heirs of the tenants shall inherit. *Lit. Ten.* 40.

This tenure is called *Base-Tenure*, because held at the will of the lord: but the estate of a copyholder is not merely at the lord's will, but *ad voluntatem domini secundum consuetudinem manerii*; so that the custom of the manor is essential to copyhold estates; for without a custom, or if copyholders break their custom, they are subject to the will of the lord; and as a copyhold estate is created by custom, so 'tis guided by it. *4 Rep.* 21.

Copyhold land cannot be made at this day; for the pillars of a copyhold estate are, That it hath been demised time out of mind by copy of court-

court-roll; and that the tenements are parcel of or within the manor. A manor is lost where there are no customary tenants or copyholders: and if a copyhold comes into the hands of the lord, and he leases it for one year, or half a year or for any certain time, it can never be granted by copy after; and if a copyholder bargains and sells his copyhold to a lessee for years, &c. his copyhold is extinguished. *Co. Lit.* 58. 4 *Rep.* 24. 2 *Danv. Abr.* 176, 205.

These copyhold estates are most commonly for three lives: and when any copyholder for life refuseth to pay his rent, or upon summons refuses to come to court and be sworn of the homage, or to make presentment; if he commits voluntary waste, or cuts down timber on his copyhold lands, except it be for reparations, they are forfeitures of his copyhold: but a copyholder for life committing waste shall not forfeit the estate of him in remainder: and action of the case lies for him in remainder against copyholder for life that commits waste. A copyholder may make a lease for one year of his estate, by the general custom, and no more, without incurring a forfeiture; but he may make such a lease for a year, and covenant with the lessee, that after the end of that year, he shall have the same for another year, and so during the space of seven years, &c. *Cro. Eliz.* 880. *Cro. Car.* 7. 3 *Lev.* 128. *Cro. Jac.* 300. 6 *Mod.* 468.

The grant of copyhold estates regularly passeth by surrender and admittance: a copyholder cannot transfer his interest to a stranger, otherwise than by surrender to the lord, to the use of him that is to have the estate. By the common custom of copyhold estates, copyholders

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may surrender in court, and need not alledge any particular custom for it; though if they surrender out of court, into the hands of the lord by customary tenants, &c. particular custom must be pleaded; surrenders may be made by attorney, but not admittances. Copyholder for life pleaded a custom, that every copyholder for life might in the presence of two other copyholders appoint who should have his estate after his death, without any surrender to his use; and that those copyholders might assess a fine, &c. and it was adjudged a good custom. And by the custom of some manors, where copyhold lands are granted to two or more persons for their lives; the person first named in the copy may surrender all the lands. *Co. Lit.* 58, 59. 9 *Rep.* 75. *Rel. Abr.* 500. 4 *Leon.* 238. *Nelf. Abr.* 497.

A custom to compel a lord to make a grant, is against law; though it may be good to admit a tenant. On admittances, a fine is paid to the lord; and fines may be due on every change of the lord or tenant, and are either certain by custom or uncertain; but must be reasonable; In case of surrender, it is said the lord may make what fine he pleases. A heriot is due to the lord of the best beast, or other thing, upon the death of a copyhold for life, or in fee; and is distinguished into heriot-custom and heriot-service; for the first the lord may seize any beast of the tenant any where, and for the last may distrain on the land, &c. And a lord may take a distress of any man's beasts which are upon the lands, and retain them until the heriot is satisfied. *Moar* 708. 4 *Rep.* 27, 28. *Coke Copyhold* 25, 31. *Plow.* 96.

2. A copyhold estate in fee is copyhold of inheritance, to hold to a man and his heirs. Where there is tenant for life, remainder in fee of a copyhold; he in remainder may surrender his estate: the admittance of copyholder for life is an admittance of him in remainder; and the remainder man may after the death of tenant for life, surrender without being admitted. *Gr. Eliz. 504. 3 Leon. 329.*

In admittance of copyhold tenants upon voluntary grant, the lord is proprietor; but in admittance upon surrender, or by descent, he is only an instrument of conveyance: on a surrender, the person making it, continues tenant till the admittance of the surrenderee; but he cannot pass away the land, or subject it to any other incumbrances than at the time of the surrender; and till admittance, which is the giving of possession, the tenant hath not an estate therein which he may surrender. But the heir of a copyholder may enter, and bring trespass, before admittance, he being in by descent; and may surrender before his admittance, tho' he is not a complete tenant, to be sworn of the homage jury, or maintain a plaint in the lord's court. A surrender out of court is to be presented at the next court; and if the surrenderee or surrenderee die before presentation, it is held a presentation afterwards makes it good: tenants refusing to present are compellable in the lord's court; and the lord not doing right may be compelled to it in chancery. *2 Rep. 11, 12. Compl. Cop. Sett. 39. Lit. Rep. 234. Gr. Eliz. 90.*

If the heir of a copyholder in fee, being of age, do not come in and be admitted, upon three solemn proclamations, made at three se-

veral courts, if the death of his ancestor be presented, he may forfeit his estate: but if an infant come not in to be admitted, it is no forfeiture: so one beyond sea, &c. And by particular custom these forfeitures may be mitigated, and the copyholder only amerced. No infant or feme covert, shall forfeit any copyhold lands for their neglect to come to court to be admitted, or refusal to pay any fine; but on their defaults, the lord or his steward may name a guardian or attorney, and so admit them; and enter on the land, and receive the rents, &c. till the usual fine is paid. 4 Rep. 27. Stat. 9 Geo. II. 29.

Some statutes extend to copyhold lands, and some not; the statutes of fines bar copyhold estates; and they are within the statutes of limitation, and the acts against bankrupts: but copyholds are not within the statute of jointures, or of uses; nor shall be extended in execution. Sav. 67. Gilb. Ten. 160, 185, 242. Rel. Abr. 888. Cro. Car. 44. Hardr. 433. O. Benl. 163. 3 Co. 9. 6 Vin. Abr. 169. pl. 4. 3 Read. Stat. Law. 123. 2 Inst. 396. Co. Cop. 149. A copyhold cannot be entailed by statute, but by custom it may; and as copyholds may be intailed by custom, so by custom may the tail be cut off by surrender: and a surrender may be to the use of a man's will, &c. A plaint may be made in the court of the manor, in nature of a real action; and a recovery shall be had thereon against tenant in tail, which shall be a discontinuance to the estate-tail. Gra. Eliz. 879. 4 Rep. 22. Co. Lit. 60. Brownl. 121. Stat. 18 Ed. II. 4. 32 H. 8. c. 2. 113. El. c. 7. Copy-

Copyholds descend according to the rules and maxims of the Common Law: but copyhold inheritances have no collateral qualities, which do not concern the descent; as to make them assets, to bind the heir, or whereof the wife may be endowed, &c. Tho' by particular custom, a husband may be tenant by the curtesy, and the wife be tenant in dower, &c. *Cro. Eliz.* 148. 361.

3. The copyholder's widow's estate is created by custom; and in some manors every man's life hath a widow's estate annexed to it, and in others only those lives that are purchasers.

As this tenure during widowhood arises out of the husband's estate; therefore his admittance is the admittance of her: and she who hath a widow's estate by the custom of the manor, on the death of her husband is not obliged to pay a fine to the lord, &c. her estate being only a branch of the husband's. Also when a custom is, that the wife of every copyholder shall have her *Free-Bench*, after the death of the husband, the law casts the estate upon the wife, so that she shall have it before admittance, &c. *Hut.* 18. *Hob.* 181. 2 *Danv.* 184.

But where a wife is entitled to her *Free-Bench* by custom, and a copyholder in fee surrenders to the use of another, and then dies, it hath been adjudged that the surrenderee should have the land, and not the wife; because the wife's title doth not commence 'till after the death of her husband; but the surrenderee's title begins by the surrender, and the admittance relates to that. *Co. Lit.* 59. *Salk.* 185. 12 *Mod.* 49.

A married woman may receive a copyhold estate by surrender from her husband, because she comes not in immediately by him, but by the admittance of the lord according to the surrender. A feme covert is to be secretly examined by the steward, on her surrendering her estate. 4 Rep. 29. 1 Inst. 49.

If any copyholder, paying the services due, be ejected by the lord, he or she shall have trespass against him. 4 Rep. 21.

Lease for years by a copyholder, with licence, defeats the widow of her *Free-Bench*, where she would have been entitled to it, if her husband had died seised. Cowp. Rep. 481.

Difference between *Free-Bench* and dower. Cowp. Rep. 481.

Quere, whether copyholds within stat. 27 Eliz. chap. 4. Cowp. Rep. 705.

If statute for abating lands within a manor, directs all disputed claims to be tried by a feigned issue, and limits the time of bringing it to six months, an action brought against a copyholder within time, and abated by his death, must be revived against the heir, within six months after the plaintiff has notice of the descent tho' the heir had not been admitted till long after that time. Cowp. Rep. 738.

One gross fine cannot be assessed on the admission to several copyhold tenements. Dougl. Rep. 722.

If a copyhold be granted for term of years, executor of termor, is obliged to be admitted, and the lord is intitled to a fine, upon such admittance. 1 Burr. Rep. 218.

Copyhold estate according to surrender not admittance. 3 Burr. Rep. 1544. Loff's Rep. 390.

Copy-

Copyhold estate liable to special occupancy.
Bl. Rep. 1148.

Custom to bar intails of copyholds, by recovery or surrender, good. *Wils. Rep.* 27.
2 Stra. 1197. *2 Bl. Rep.* 944.

Custom for feme covert to surrender without her husband, void. *2 Wils. Rep.* 1.

Single instance sufficient to prove custom of maner. *3 Wils. Rep.* 63.

The several other heads of the chapter relate particularly to,

1. Ancestors and the laws concerning them.
2. Heirs to persons dying seised of lands.
3. Executors appointed by will.
4. Administrators by statute.

1. Ancestor signifies as much as a predecessor, or one that has gone before in a family: but the law makes a difference between what we commonly call an ancestor, and a predecessor; the one being applied to a natural person and his ancestors, and the other to a body politick and their predecessors.

A prepossessor of an estate hath been called ancestor, and there is homage ancestrel, and some writs that are called ancestrel, &c. *Homage Ancestrel* is where a man and his ancestors have time out of mind held their land of the lord by homage, or service of submission; and such lord is obliged to acquit the tenant against all other lords above him, and if the tenant is impleaded, shall warrant the land, &c. But there must be a double prescription for it; so that the same tenant and his ancestors, whose heir he is, is to hold

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hold the same land of the same lord and his ancestors also, whose heir the lord is, time out of memory, &c. *Terms de Ley* 392. *Lit. Sect.* 85. *F. N. B.* 269.

The writs ancestrel are the assise of *Mort d'Ancestor*, and *Darrein Presentment*; where a man's ancestor dies seised of lands, or presented to a church, &c. to recover the same from an abator or disturber. *Reg. Orig.* 223, 30.

2. An heir is one that succeeds by descent, to lands, tenements and hereditaments, being an estate of inheritance: and a person cannot be heir 'till after the death of the ancestor; for in his life time, he is only heir apparent, or at law. *Co. Lit.* 8.

The word *Heirs* comprehends heirs of heirs *in infinitum*: if lands are given to a man and his heirs, all his heirs are so totally in him, that he may give his lands to whom he will. But a bastard; an alien, though born in lawful wedlock; persons attainted of treason or felony, whose blood is corrupted, may not be heirs. An idiot or lunatick, one excommunicated, an outlaw in debt, trespass, persons attained in a *Premunire*, &c. may be heir to a man. *Co. Lit.* 9, 21.

An ancestor could not by the Common Law, convey away lands by will from his heirs at law, without consent of the heir; but by the Stat. 32 H. 8. of wills, the law is altered in that point. The heir being very much favoured at law, dubious words in a will ought to be interpreted for his benefit; and not to disinherit him: an heir shall enforce an administrator to pay debts with the personal estate, to preserve the inheritance: he is not bound in the bond of his ancestor, unless expressly bound; if in a bond a man binds his heirs, but not himself, it is void.

A man shall never bind his heir to warranty, where he himself was not bound: a grant of an annuity must be for a man and his heirs, to bind the heir, though there be assets; and if named, an heir shall not be bound, except there be assets, as lands, &c. by descent. 2 Lil. Abr. 11. Noy 185. 2 Saund. 136. Co. Lit. 386, 144. Canc. Rep. 7, 280.

Where *Cestuy que Trust* dies, leaving a trust in fee-simple to descend to the heir; this trust will be assets by descent in the heir's hands, and be liable to the obligation of his ancestors: and 'tis said, when assets descend, a *Scire facias* for debt lies against the heir of an heir, to the tenth degree. Heirs and executors are both chargeable upon specialties: but if the heir is sued for the debt of his ancestor and pays it; he shall be reimbursed by the executor of the obligor, who hath personal assets. 29 Car. 2, 3. perpetuated by 1 Jac. 2. c. 17. s. 5. Noy 56. Dy. 303. Chanc. Rep. 74.

An heir may bring an action against one that injures the monument, &c. of his ancestor. And the coffin and shroud of the deceased are the executor's or administrator's; but the dead body belongs to no one: tho' in all cases where taken away, actions and prosecutions may be had. 2 Inst. 202. See *Action of debt*, &c.

Heir at law cannot be disinherited by plainest intention apparent on the face of the will, unless the estate is completely devised over to another. Cowp. Rep. 661. Dougl. Rep. 763.

The word "*Heirs*" construed to mean heirs of the body. Dougl. Rep. 340. 3 Wils. Rep. 418.

"*Heirs of the body*" are some times construed as words of limitation. Dougl. Rep. 340.

Some-

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Sometimes as words of purchase. *Dougl. Rep.* 487. 506. n.

Maternal heirs sometimes preferred to paternal, and sometimes *vice versa*. *Dougl. Rep.* 771.

Heir may bring ejectment of copyhold lands before admittance. *2 Wils. Rep.* 14.

Whoever claims as heir by descent, must make himself heir to the person last actually seized, and in possession of the inheritance. *2 Wils. Rep.* 45. *3 Wils. Rep.* 526.

Whoever takes as heir male, by purchase, must be both heir and male. *Wils. Rep.* 20.

Relation by *half* blood, cannot be heir. *Loff's Rep.* 396, &c.

3. Executor is he to whom the execution or performance of a man's will is committed after his death. All persons that are capable of making a will may be executors; and so may some others; as an infant may be executor, but not act till seventeen years of age; a woman covert may be appointed executor; so may an excommunicate or outlawed person, &c. But popish recusants convict cannot be executors. *4 Inst.* 335. *5 Rep.* 29. *6 Rep.* 67.

If a man, who is neither executor or administrator, acts as an executor; as when he takes into his hands the goods of the deceased, and converts them to his own use, or alters the property by sale, &c. or if he deliver the goods to creditors or legatees; receive any debt due to the deceased, &c. he is executor in his own wrong, and shall be sued as executor: but every taking of the deceased's goods, is not an acceptance to make one chargeable; for if a man take away his own goods in the house of the de-

deceased; or use some of the goods of the deceased in the necessary occasions of his family; bury the deceased, and sell his goods for that purpose, &c. these will not make a man executor in his own wrong. 5 Rep. 31. 8 Rep. 135. 9 Rep. 39. Dy. 166. Noy's Max. 103.

Executors legally appointed may accept or refuse the executorship: and if there are many, and one proves the will, and takes upon him the executorship, it will do for all; but the rest may at any time after join with him, and intermeddle with the estate; but in case they all refuse, none of them ever after will be admitted: here the ordinary, or where an executor dies before the will is proved, grants administration with the will annexed. In the eye of the law all, who take upon them the executorship, are but as one executor; and most acts done by or to any one of them, are acts done by or to all: actions are to be brought by executors, in the name of all of them, altho' some refuse the executorship; though he or those only that administer shall be sued, in actions against them. 9 Rep. 37. Perk. 485. Co. Lit. 113. Rel. Abr. 924, 928.

As an executor hath his power wholly by the will, he may take the goods himself, or authorize another to seize them for him; or may release an action, debt or duty, or do any thing as executor, before probate of the will, so as he afterwards proves it; unless it be bringing of actions for debts, &c. to maintain which, he must shew the testament proved. His office is to bury the testator in a decent manner according to his rank, and with regard to the estate left: he is to make an inventory of all the goods

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and chattels of the deceased, with their value, and all debts due to the testator; then prove the will in common form before the ordinary, by his own oath, or by witnesses, if required; and being exhibited in the register's office of the ecclesiastical court, a copy in parchment is delivered the executor, under the ordinary's seal, which is the probate: and when all this is done, an executor must pay all debts, before legacies, in the order following, *viz.* After the funeral charges, the king's debt is to be preferred; then debts on judgments and statutes; debts on mortgages, bond and other specialties; rent, servants wages, debts on shop-books, &c. *Plowd.* 277. *Co. Lit.* 292. *5 Rep.* 28, 1. *Roll. Abr.* 917, 926. *Perk.* 486.

Amongst debts of equal degree, the executor may pay himself first: but if he pay the debts in any other order, he is answerable for the debts of a higher degree, altho' it be out of his own estate. Those debts, that are first sued for, shall be first paid; and where no suit is begun, the executor may pay the whole debt to any one creditor in equal degree, though there be no assets left to satisfy another any part of his debt. Where there are two executors, and one dies, debt is to be brought against the surviving executor; not the survivor and the executor of the deceased: but in equity, the testator's goods are liable in whosoever hands they are. And by statute, executors of executors shall answer for goods, as the first executor: also they may bring actions of debt, account, &c. and executors shall have the like writs, actions and process, as the testator might have had, and trespass and damages for wrong done to him. *Noy Man.* 104. *Leon. Ca.* 304. *Cane. Rep.* 57. *Stat.* 4. *Ed.* 3. *c.* 7. 25 *Ed.* 3. *ff.* 5. *c.* 5.

After

After the debts are paid by the executor, he is to pay the legacies; in payment whereof he may prefer a legacy to himself: then he may pay what legacies he pleases first; or pay each legatee a part in proportion, if there be not enough to pay every one his whole legacy; and he is not bound to order, as in case of debts due from the testator. But if there be a specifick legacy, as of a silver tankard, &c. this must be delivered before any other legacy; if there be assets: and where there is enough to pay all the legacies, they shall be paid; but when there is not enough to pay debts, or more, the legatees must lose their legacies. If an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice, which he is obliged to pay; the executor by bill may force the legatees to refund. *Plowd.* 545. *Offic. Exec.* 204, 217. *2 Ventr.* 348. *Canc. Rep.* 136.

All the goods and chattels, which belong'd to the testator at the time of his death come to the executor as assets, and make him liable to the debts and legacies of the creditors and legatees; goods, chattels, debts, &c. recovered by the executor, by action after the death of the testator, shall be accounted assets; not before recovered. If an obligee makes his obligor executor, this is a release in law of the debt: but it shall be assets in his hands; and where an executor hath a bond, and releases the debt, tho' without consideration, it will be assets. On a *Scire facias* against an executor, he cannot plead fully administered; but must plead specially, that no goods of the testator are come to his hands: special bail is not required of heirs, executors, &c. in any action brought for

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the debt of the testator; and executors and administrators shall pay no costs. 6 Rep. 47. Cg. Lit. 374. 8 Rep. 136. Lil. Abr. 568. 24 H. 8. c. 8.

On personal demand against an executor, there can be no judgment *de bonis testatoris*. Cowp. Rep. 289.

Executor having assets sufficient consideration for promise by him, to pay a legacy. Cowp. Rep. 290, 293.

What actions survive against executors. Cowp. Rep. 375.

Executor cannot be sued in county court of Middlesex. Dougl. Rep. 263, 264.

Probate of will only necessary to enable executor to sue for debts. Loffi's Rep. 81.

Payment of interest not conclusive evidence against executor, of his having assets. Loffi's Rep. 68, 69.

Executor in some cases pays costs on discontinuing. Bl. Rep. 451. 3 Burr. Rep. 1457.

Executor may demise before probate of will, lands thereby demised. 2 Bl. Rep. 692. 5 Burr. Rep. 2608.

4. An administrator is one who hath the goods of a man dying intestate, without making any will, committed to his charge by the ordinary: who must make an inventory of the goods of the deceased, in the presence of two creditors the next of kin, or two neighbours, and deliver it upon oath to the ordinary.

The ordinary of every diocese is to appoint administrators, to gather up and dispose of the goods of the deceased; account for them, &c. by the Stat. West. 2. 13 Ed. 3. c. 19. And on granting administration, bonds with sureties are taken for faithful discharge of trust, and render-

rendering accounts. 22 & 23 *Car. 2. c. 10.* perpetuated by 17. 2. *c. 17. s. 5.* Widows, and the nearest of kin, are to be appointed administrators; and the mother shall have administration of goods of a child, before a brother or sister, &c. The husband shall be administrator of the wife's goods, and the wife of the husband's; and if there be no husband or wife left on the death of either, then is administration granted to children, sons or daughters; if no children alive, to father or mother; and if none such, to brother or sister; and then to next of kin, as uncle, aunt, cousin. 21 *H. 8. c. 4, 5.* 4 *Rep. 51.* *Ventr. 217.* *T. Raym. 93.*

A person of the half blood, is in equal degree of kindred, to have letters of administration, as one of the whole blood: and administrators are to distribute equally between whole blood and half blood. A creditor or other person, may be made administrator; and where administration is neglected, the ordinary may grant to a stranger letters to gather the goods of the intestate; or may take them into his own hands, to pay the deceased's debts, in such order as an executor or administrator ought to do it. Where administration is granted, it shall not be revoked without just cause; though if granted where not grantable, may be repealed by delegates: if an administrator die, his executors are not administrators; but new administration shall be had. *Lil. Abr. 40.* 2 *Lev. 173.* 8 *Rep. 136.* *Lev. 157, 186.*

The estates of persons dying intestate, are to be distributed by administrators, one third to the wife, and the residue equally amongst the children, and their representatives; if no children, one moiety of the personal estate is to go

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to the wife, and the rest equally to the next of kin: and if no wife, but children, it shall be distributed amongst the children; and if no children nor wife, to go to the next of kin in equal degree. But this is not to extend to estates of feme coverts, &c. And where children die after their father, without wife or child, the mother and every brother and sister, and their representatives, shall have equal shares in their estates. No representative shall be allowed after brothers and sisters children; and children advanced in the intestate's life-time, are excepted by the statute 22 & 23 Car. 2. c. 10. 14 Geo. 2. c. 20. s. 9. 29 Car. 2. c. 3. s. 25. perpetuated by 1 Jac. 2. c. 17. s. 5.

Against an administrator, and for him, action will lie, as for and against an executor; and he shall be charged to the value of goods, and no further, unless he waste the goods of the intestate; but an administrator can do nothing 'till administration is granted. *Vent. 307.*

Touts temps prist, the manner of pleading it by an administrator. *Say. Rep. 18.*

Right of granting letters of administration does not depend upon the dying within a diocese, but upon the leaving goods therein. *Say. Rep. 99.*

Letters of administration may be acted under, until they are revoked. *Say. Rep. 99.*

If letters of administration are revoked, after execution executed upon a judgment, *audita querela* lies. *Say. Rep. 100.*

Creditor as well as next of kin has right to sue upon administration bond, in name of archbishop or ordinary. *Cowp. Rep. 140.*

Husband's right of administration to his wife, is transmissible to his representative, and shall not go to her's. *Wils. Rep. 168.*

If

If the husband does not reduce wife's right into possession, and she survives and then dies, her representative shall have it. *Wils. Rep.* 169.

Of the Laws relating to Marriage, Bastardy, Infants, Idiots, Lunatics.

MARRIAGE signifies the lawful conjunction of man and woman in a constant society and agreement of living together, 'till the contract is dissolved by death or breach of faith, or some notorious misbehaviour, destructive of the ends for which it was intended: and mutual consent between parties 'tis said makes the marriage before consummation. I shall divide this subject of marriage into divers parts or branches, as,

1. How marriages are solemnized.
2. What persons may marry.
3. Contracts of marriage.
4. Rights of husband and wife.
5. Marriage settlements and jointures.

1. Marriage was instituted in a state of innocence, for preservation thereof, and is one of the rights of human nature; and as to the solemnization of marriage, this is a civil right, regulated by the laws and customs of the kingdom or country where we reside; and every state allows such privileges to the parties as it deems expedient, and denies legal advantages

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to those who refuse to solemnize their marriage in the manner it requires: but they cannot dissolve a marriage celebrated in another manner, marriage being of divine institution, to which only a full and free consent of the mind is necessary. *Moor. 170.*

There is a marriage in right or in possession; and marriage *de facto*, or in reputation, as among Quakers. &c. which is allowed to be sufficient to give title to a personal estate: tho' in the case of a *Dissenter*, who was married to a woman by a minister of the congregation, not in orders, it was held, that when a husband demands a right due to him as husband by the ecclesiastical law, he ought to prove himself a husband by that law to entitle him to it: yet this marriage was not a mere nullity, because by the law of nature the contract is binding. Marriages by *Romish Priests* whose orders are acknowledged by the church of *England*, will have the effect of a legal marriage in some instances; as in the case of Mr. *Fielding*, who was married by a *Romish* priest to Mrs. *Wadsworth*: this was held to be such a marriage, as make it felony in him to marry afterwards to the dutchess of *Cleveland*. 4 *Read. Stat. Law* 200. 2 *Burn's Eccles. Law* 30. but marriages should be solemnized according to the rites of the church of *England*, for the parties to be intitled to the privileges attending marriage here; as dower, thirds, &c. *Leon. 53. Wood's Inst. 59. Salk. 119.*

To guard against private marriages, it is ordained, that parsons, vicars or curates, marrying any persons, or employing other ministers to do the same, without publishing the banns of matrimony according to law, or without a licence for

for the marriage first had and obtained, shall forfeit 100*l.* the persons so married 10*l.* and parish-clerks, &c. assisting, knowing it to be so, 5*l.* by the statute 7 & 8 *W. 3. c. 35.* And before this statute an information was exhibited against a person for combination, in procuring a clandestine marriage in the night, without banns or licence, between a maid-servant and a young gentleman who was heir to an estate; and the parson being in liquor was fined 100 marks, and ordered to be committed 'till paid: but it does not appear that the marriage could be made void. *Cro. Car. 557.*

By the ordinances of our church, when persons are to be married, the banns of matrimony shall be published in the parish-church where they dwell three several Sundays or holidays, in the time of divine service; and if at the day appointed for their marriage, any man do alledge any impediment, as precontract, consanguinity, or affinity, parents not consenting, where under age, &c. why they should not be married, and become bound with sufficient sureties to prove his allegation; then the solemnization must be deferred, until such time as the truth is tried: and no minister shall celebrate matrimony between any persons without a faculty or licence, except the banns have been first published, as directed by the book of common prayer, upon pain of suspension for three years; nor shall any minister, under the like pain, join any persons in marriage who are so licensed, at any unreasonable times, or in a private place, &c. *Rubrick, Canon 62.*

And on granting of licences for marriage, *Affidavit* or oath is to be first made before one of the doctors of the commons, by the man, that

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he and the woman live at such a place, &c. and are willing to marry each other; that there is no impediment of precontract, consanguinity, &c. or any suit depending in any ecclesiastical court, touching any contract of marriage of either of the parties with any other, &c. And then a *Bond* is entered into, to the like effect, as to there being no impediment of precontract, or any suit depending, &c. that neither of the parties are of better estate than suggested; and that the marriage be openly solemnized in the church mentioned, in canonical hours, between eight and twelve in the morning, &c. Licences to the contrary shall be void; and the parties marrying are subject to punishment as for clandestine marriages. *Can. 102.*

There are some things disused on granting *Licences*; as the testification of witnesses of the consent of parents; and celebrating the marriage in the parish-church where one of the parties dwelleth, &c. and notwithstanding the canons, marriages of persons of quality are frequently in their own houses, out of canonical hours, in the evening; and often solemnized by others in other churches, &c. which things are dispensed with, in regard to the substance of the marriage, to make the same good without all the ceremonies. But now

‘ All banns of matrimony shall be published
 ‘ in an audible manner in the parish-church, or
 ‘ in some publick chapel, in which banns of
 ‘ matrimony have been usually published, be-
 ‘ longing to such parish or chapelry wherein
 ‘ the persons to be married dwell; according
 ‘ to the form prescribed by the rubric prefixed
 ‘ to the office of matrimony in the book of
 ‘ common prayer; upon three *Sundays* preced-
 ‘ ing

ing the solemnization of marriage, during the time of morning service (or of evening service, if there be no morning service in such church or chapel upon any of those *Sundays*) immediately after the second lesson: and when the persons to be married dwell in divers parishes or chapelries, the banns shall be published in the church or chapel belonging to such parish or chapelry wherein each of them dwell; and where both or either of the persons to be married dwell in any extraparochial place, having no church or chapel wherein banns have been usually published, then the banns shall be published in the parish-church or chapel belonging to some parish or chapelry adjoining to such extraparochial place: and where banns shall be published in any church or chapel belonging to any parish adjoining to such extraparochial place, the parson, vicar, minister or curate, publishing such banns, shall under his hand certify the publication thereof, in such manner as if either of the persons to be married dwell in such adjoining parish, and all other rules prescribed by the said rubrick, concerning the publication of banns, and the solemnization of matrimony, not hereby altered, shall be observed: and in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published. *Stat. 26 Geo. 2. c. 33. s. 1.*

No parson, vicar, minister or curate shall be obliged to publish the banns of matrimony between any persons, unless the persons to be married shall seven days before the time required for the first publication of such banns, cause to be delivered to such parson, &c. a notice

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‘notice in writing of their christian and surnames, and of their respective abodes within such parish, chapelry or extraparochial place, and of the time during which they have dwelt in such houses respectively.’ *Id. sect. 2.*

‘No parson, &c. solemnizing marriages between persons, both or one of whom shall be under the age of 21 years, after banns published, shall be punishable by ecclesiastical censures, for solemnizing such marriages without consent of parents or guardians, whose consent is required by law, unless such parson, &c. have notice of the dissent of such parents or guardians. And in case such parents or guardians, or one of them, publicly cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, their dissent to such marriage, such publication of banns shall be void.’ *Id. sect. 3.*

‘No licence of marriage shall be granted, by any person having authority to grant such licences, to solemnize any marriage in any other church or chapel, than in the parish church or public chapel belonging to the parish or chapelry, within which the usual place of abode of one of the persons to be married shall have been for four weeks, immediately before the granting such licence; or where both or either of the parties to be married dwell in any extraparochial place, having no church or chapel wherein banns have been usually published; then in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place.’ *Id. sect. 4.*

‘All

‘ All parishes where there shall be no parish-
‘ church or chapel, or none wherein divine ser-
‘ vice shall be usually celebrated every *Sunday*,
‘ may be deemed extraparochial places for the
‘ purposes of this act.’ *Id. sect. 5.*

‘ Nothing herein contained shall deprive the
‘ archbishop of *Canterbury* and his officers, of
‘ the right which hath hitherto been used, in
‘ virtue of 25 *Hen. 8. c. 21.* of granting special
‘ licences to marry at any convenient time or
‘ place.’ *Id. sect. 6.*

‘ No surrogate deputy by any ecclesiastical
‘ judge, who hath power to grant licences of
‘ marriage, shall grant any such licence, be-
‘ fore he hath taken an oath before the said
‘ judge, faithfully to execute his office accord-
‘ ing to law to the best of his knowledge, and
‘ hath given security by his bond in the sum of
‘ 100*l.* to the bishop of the diocese, for the
‘ faithful execution of his office.’ *Id. sect. 7.*

‘ If any person shall solemnize matrimony in
‘ any other place than a church or public cha-
‘ pel, where banns have been usually published,
‘ unless by special licence from the archbishop
‘ of *Canterbury*; or shall solemnize matrimony
‘ without publication of banns, unless licence
‘ of marriage be first obtained from some per-
‘ son having authority to grant the same; every
‘ person wilfully so offending and convicted,
‘ shall be adjudged guilty of felony, and shall
‘ be transported to some of his majesty’s plan-
‘ tations in *America*, for 14 years, according to
‘ the laws for transportation of felons. And all
‘ marriages solemnized in any other place than
‘ a church or such public chapel, unless by
‘ special licence as aforesaid, or without publi-
‘ cation of banns, or licence of marriage from a
‘ person

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‘ person having authority to grant the same, shall be void.’ *Id. sect. 8.*

‘ All prosecutions for such felony shall be commenced within three years after the offence committed.’ *Id. sect. 9.*

‘ After the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage, to give any proof of the dwelling of the parties in the respective parishes or chapeltries wherein the banns were published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for four weeks as aforesaid, was in the parish or chapeltry, where the marriage was solemnized; nor shall any evidence in any of the said cases be received to prove the contrary in any suit touching the validity of such marriage.’ *Id. sect. 10.*

‘ All marriages solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of 21 years, which shall be had without the consent of the father of such of the parties so under age, if living, or if dead, of the guardians of the person of the party so under age, or one of them; and in case there be no such guardian, then of the mother, if living and unmarried; or if there be no mother living and unmarried, then of a guardian of the person appointed by the court of *Chancery*, shall be void.’ *Id. sect. 11.*

‘ In case any such guardian or mother or any of them, whose consent is made necessary, shall be *non compos mentis*, or beyond the seas, or shall refuse their consent to the marriage, it shall be lawful for any person desirous of marrying, in any of the before mentioned cases,

‘ to

‘ to apply by petition to the lord chancellor;
 ‘ who is hereby impowered to proceed upon
 ‘ such petition in a summary way; and in case
 ‘ the marriage proposed appear proper, the lord
 ‘ chancellor shall judicially declare the same to
 ‘ be so by an order of court, and such order
 ‘ shall be deemed as good as if the guardian or
 ‘ mother of the person so petitioning, had con-
 ‘ sented to such marriage.’ *Id. sect. 12.*

‘ The churchwardens and chapelwardens of
 ‘ every parish or chapelry shall provide books
 ‘ of vellum, or durable paper, in which all mar-
 ‘ riages and banns of marriage respectively, there
 ‘ published or solemnized, shall be registered;
 ‘ and every page thereof shall be marked at the
 ‘ top with the number of such page, begin-
 ‘ ing at the second leaf with number one; and
 ‘ every leaf or page so numbered, shall be ruled
 ‘ with lines at proper and equal distances; and
 ‘ all banns and marriages published or celebra-
 ‘ ted in any church or chapel, or within any such
 ‘ parish or chapelry, shall be registered, prin-
 ‘ ted or written upon, or as near as may be to
 ‘ such ruled lines; and shall be signed by the
 ‘ parson, vicar, minister or curate, or by some
 ‘ other person in his presence, and by his direc-
 ‘ tion; and such entries shall be made on or
 ‘ near such lines in successive order, where the
 ‘ paper is not damaged or decayed, until a new
 ‘ book shall be necessary; and then the direc-
 ‘ tions aforesaid shall be observed in every such
 ‘ new book. And all books provided as afore-
 ‘ said, shall belong to every such parish or cha-
 ‘ pelry respectively, and shall be carefully pro-
 ‘ served for publick use.’ *Id. sect. 14.*

‘ All marriages shall be solemnized in the
 ‘ presence of two witnesses, besides the mini-
 ‘ ster

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‘fter who shall celebrate the same. And immediately after the celebration of every marriage, an entry thereof shall be made in such register; in which it shall be expressed, that the said marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses.’ *Id. sect. 15.*

‘If any person shall, with intent to elude this act, wilfully insert, or cause to be inserted, in the register book of such parish or chapelry, any false entry of any thing relating to any marriage; or falsely make, alter, forge or counterfeit, or cause to be falsely made, &c. or assist in falsely making, &c. any such entry in such register; or falsely make, &c. or cause to be falsely made, &c. or assist in falsely making, &c. any such licence of marriage as aforesaid, or publish as true any such false, altered, forged or counterfeited register, or a copy thereof, or any such false, &c. licence of marriage, knowing such register or licence of marriage respectively to be false, &c. or if any person shall wilfully destroy, or cause to be destroyed, any register-book of marriages, or any part of such register-book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; every person so offending, and being convicted, shall be adjudged guilty of felony, and shall suffer death.’ *Id. sect. 16.*

‘This act shall not extend to the marriages of any of the royal family.’ *Id. sect. 17.*

‘No-

‘ Nothing in this act shall extend to *Scotland*,
 ‘ nor to any marriages amongst *Quakers*, or
 ‘ amongst persons professing the *Jewish* reli-
 ‘ gion, where both the parties to such marriage
 ‘ shall be *Quakers*, or persons professing the
 ‘ *Jewish* religion; nor to any marriages solem-
 ‘ nized beyond the seas.’ *Id. sect. 18.*

It having been determined in the court of
King’s Bench, in *Easter* term, 21 *Geo. 3.* that a
 marriage celebrated in a chapel erected since
 this marriage act, was void, Lord *Beauchamp*
 introduced a bill into parliament, which passed
 into a law, for making all marriages, which
 had been celebrated in any parish church or
 public chapel, since the said act of 26 *Geo. 2.*
c. 33. and consecrated, valid in law, and to
 exempt the clergymen, who had celebrated
 such marriages, from the penalties of that sta-
 tute. See 21 *Geo. 3. c. 53. Dougl. Rep. 661.*

The proof of a marriage may be by witnesses
 who were present at the solemnization; by co-
 habitation of the parties; by publick fame and
 reputation; by confession of the married persons
 themselves, altho’ their acknowledgment might
 only be to avoid the punishment of fornication;
 and by divers other circumstances; which if
 they amount to a half proof, ought to be ex-
 tended in favour of marriage rather than con-
 trary to it. *Wood Civ. L. 122. 2 Burn’s Ec-
 cles. Law 36. pl. 5.*

Entry of names of persons, as married, in a
 church book is not positive evidence of the
 marriage, unless the identity of the persons be
 proved; or that it be strengthened with proof
 of cohabitation, or allowance of parties. 15
Vin. Abr. 254. pl. 6. 2 Eq. Cas. Abr. 585.
pl. 3. Gr. & Rud. Law & Eq. 206. pl. 3.

After

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After solemn declaration by woman that she was married, and that goods in his possession, were his goods in her right; she shall never be allowed to say against creditors, that she was not married, and that the goods were her sole property. *Cowp. Rep.* 233.

Actual celebration of marriage need not be proved in any civil case whatever, except in actions for *crim. con.* *Dougl. Rep.* 174. 4 *Bur. Rep.* 2057. 1 *Bl. Rep.* 632.

Whether clandestine marriages in Scotland are good in England. *Bl. Rep.* 259. 2 *Bur. Rep.* 1078, 1079.

Promissory note of hand given fraudulently, in order on a marriage treaty, shall be good against the drawer, though given without any consideration. *Bl. Rep.* 363.

No occasion to shew, that banns were actually published, or the marriage register regularly signed, to establish a marriage under the act. *Bl. Rep.* 367. 2 *Burr. Setl. Cas.* 506. pl. 162. 3 *Bur. Rep.* 1317.

Strong acknowledgement of marriage, for eighteen years together, sufficient to establish it among the living, though no actual proof to be had, the supposed marriage being previous to the marriage act. 2 *Bl. Rep.* 877.

See Bonds.

The usual fees and charges of taking out marriage licence, under the bishop's seal, which is signed, by the register, with the affidavit and bond, amount to 1 *l.* 5 *s.* and altho' but one parish-church is named, ministers of almost all other * churches in the diocese will marry the parties, by virtue of the licence.

* But now they cannot. See the above statute of 26 *Geo. 2. c. 33. sect. 4.*

2. As to what persons may marry; in former times priests were restrained from marriage, and their issue accounted bastards, &c. but on the reformation laws were made, declaring that the marriage of priests should be lawful; though the preambles to those statutes set forth, that it would be better for priests to live chaste, and separate from the company of women, that they might the better attend their religious duty. *Stat. 5 & 6 Ed. 6. c. 23.*

All persons who are of the age of consent to marry, viz. the man at fourteen, and the woman at twelve, (not prohibited by the Levitical degrees, or otherwise by God's law,) may lawfully marry; but marriages made within the degrees are incestuous and unlawful. A son of a father by another wife, and daughter of a mother by another husband, cousin germans, &c. may marry with each other: a man may not marry his brother's wife, or wife's sister, an uncle his niece, or an aunt her nephew, &c. Though if one takes his sister to wife, they are baron and feme, and the issue are not bastards 'till a divorce. A sister's bastard daughter is said to be within the Levitical law of affinity; it being morally as unlawful to marry a bastard as one born in wedlock; and if a bastard doth not fall under the prohibition, a mother may marry her bastard son; and there are persons within the reason of the prohibition of marriage, though not mentioned, and must be prohibited; as the father from marrying his daughter, the grandson from marrying his grandmother, &c. *Co. Lit. 24. Levit. c. 18, 20. Rol. Abr. 340. 5 Mod. 86. Vaugh. 221.*

By the statute 32 Hen. 8. c. 38. The temporal courts are to determine what marriages are within, or without the Levitical degrees; and

prohibit the spiritual courts, if they impeach any persons from marrying without those degrees; and it has been held, if it were not for that statute, we should be under no obligation to observe the Levitical degrees. In case of perpetual impotency, fear or imprisonment, so that there can be no consent: or where persons are pre-contracted; a man or woman have a wife or husband living, &c. here the marriage are to be adjudged void, as prohibited by God's law. And loyalty or lawfulness of marriage is to be tried by the bishop's certificate; on inquisition taken before him, and examination of witnesses, &c. But where the right of marriage is not in question, whether a woman is married, or she is the wife of such a one, is triable by jury at Common Law. 2 *Ventr.* 9. *Co. Lit.* 235. 2 *Inst.* 687. 7 *Rep.* 23. *Dy.* 303. *Lev.* 41. 3 *Salk.* 64.

If any persons are married before the age of consent, they may at that age disagree, and marry again, without any divorce: but if they once give consent when at age, they cannot afterwards disagree; and where they are married before, there needeth not a new marriage, if they agree at that age. A man being of the age of consent, and the woman not; or the woman of age and the man not; he or she may disagree to the marriage, at the other's coming of age to consent, as well as the other, for there is a mutual power of disagreement: where after disagreement of the parties, at the age of consent they agree to the marriage, and live together as man and wife, the marriage hath continuance, notwithstanding the former disagreement; though if that had been before the ordinary, they could not after agree again to make

it good. *Co. Lit.* 33. 2 *Inst.* 182. 3 *Inst.* 88.
6 *Rep.* 22. *Danv. Abr.* 699.

A woman cannot disagree within her age of twelve years, till which the marriage continues; and before, her disagreement is void: Though if a man marries a woman under that age, and afterwards she within her age of consent disagrees to the marriage, and at her age of twelve years marries another; now the first marriage is dissolved, so that he may take another wife; for although the disagreement within the age of consent was not sufficient, yet her taking another husband at that age, and cohabiting with him, affirms the same, by which the first marriage will be avoided. *Danv. Abr.* 699. *Moor* 575, 764.

In no case shall any suit or proceeding be had in any ecclesiastical court, to compel the celebration of any marriage *in facie ecclesie*, by reason of any contract of matrimony, whether *per verba de presenti*, or *per verba de futuro*, entered into after 25 March 1754. *Stat.* 26 *Geo.* 2. c. 33.

On a promise of marriage, damages may be recovered at law, if either party refuses to marry, but the promise must be mutual on both sides to ground the action: and by statute 29 *Car.* 2. c. 3. no action shall be brought upon an agreement on consideration of marriage, except it be put in writing, and signed by the party to be charged, &c. A promise by letter is sufficient within this statute. Contracts and bonds for money to procure marriage between others have been held void in chancery. *Salk.* 24. 3 *Lev.* 41. 2 *Vent.* 361. 2 *Eq. Ca. Abr.* 248. *Ld. Raym.* 387. *Str.* 34.

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4. By marriage with a woman, the husband is intitled to all her estate real and personal; and the effects of marriage are, that the husband and wife are accounted one person, and he hath power over her person as well as estate, &c. Where there is no settlement to the contrary, by the marriage a man gaineth a freehold, &c. in his wife's right, if she have see: he also gains a chattel real, as a term of years. &c. All chattels personal, in possession of the wife in her own right, are the husband's. The husband shall be tenant by the curtesy of the wife's land after her death, where issue is born between them: and the wife shall have dower in her husband's lands, after the death of her husband, &c. And if she survives him, shall have her term for years, or other chattels real again, if the husband hath not altered the property. *Co. Lit.* 351, 46. *Dr. & Stud. c.* 7. *Lit.* 35, 36.

Agreements between husband and wife, before marriage, are commonly extinguished by the marriage: a man cannot grant lands, &c. to his wife, nor covenant with her; but he may covenant with others for her use, &c. and may devise to her by will. The wife is so much under the power of her husband, as to be disabled to contract without his consent; and though she may use his goods, yet she may not dispose of, or pawn them: in strictness, a wife cannot bind her husband by contract for necessities, without his assent; but generally, if she buys goods for herself, as apparel, &c. or for her family, the contracts are allowed; and the husband is bound to maintain his wife in necessities, according to his degree and estate: though if he makes the wife allowance for clothes, &c. which

which is constantly paid, he shall not be charged. *Co. Lit.* 112, 187. *2 Rep.* 713. *Rol. Abr.* 350. *Mod. Rep.* 129.

As a man is not bound by his wife's contract, without notice and assent; so 'tis said he is not bound by the wife's receipt. If a woman married enters into bond for money, as a feme sole; and she is sued as such, she may plead *non est factum*, and the coverture will avoid her bond. Where a woman sole indebted takes husband, it is then the debt of husband and wife, and both must be sued; though after the wife's death, the husband is not liable, except there be a judgment against both during the coverture: a husband is bound for the appearance of his wife, where a writ is served on her; he only shall be imprisoned for want of bail, to action brought for debt of the wife, for he must find bail for her and himself: but if a action is brought against a single woman, who pending the action marries, the plaintiff may proceed to judgment and execution against her. *Noy Max.* 94. *Leon.* 320. *Cro. Car.* 376. *Lev.* 216.

A wife may not bring an action for wrong to her, without the husband, and when they join in an action, damage is to be laid only to the husband. But by the custom of *London*, a feme covert trading in the city as a sole merchant, may sue and be sued as a feme sole: a wife in other places cannot be sued without the husband. For trespass and scandalous words, &c. of or against the wife, husband and wife are to sue and be sued; and execution awarded against him; though for her own offence, a wife may be indicted, without her husband, and be fined, &c. and in Court Christian she may sue and

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and be sued, without the joining of her husband.
Co. Lit. 182. 11 *Rep.* 62. 9 *Rep.* 72. 2 *Roll.*
Abr. 298.

In all cases where the wife shall not have the thing recovered, and for a promise or personal duty to the wife, the husband only may bring the action; and a husband is intitled to the fruits of his wife's labour, for which he may bring a *Quantum Meruit*. If a person takes any thing from the wife, the husband is to bring the action for it, who has the property: where an injury is done to the wife alone, action cannot be maintained by the husband without her; but for a loss and injury to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action; and these actions are laid for assault and detaining the wife, *per quod consortium amisit, &c.* *Roll. Rep.* 160. *Salk.* 114. *Cro. Jac.* 538.

If a husband suffers banishment for any crime, it is in law a civil death; and the wife of such a person may bring actions, or be impleaded during the natural life of the husband, which she may not do in any other case. The wife cannot be a witness either for or against her husband, nor he against her; unless it be in cases of high treason; but if a man threaten to beat or kill his wife, she may make him find surety of the peace, &c. *Co. Lit.* 133. *F. N. B.* 80.

A husband is not to alien the wife's lands, but by fine wherein she joins; if he doth, she may recover them by the writ *cui in vita* after his death: if the husband and wife acknowledge a deed to be inrolled, or a statute, &c. this will not be binding to the wife; because she is not examined by writ, to bar her, as on levying a fine. The husband may make leases of his
 wife's

wife's land for 21 years, or three lives; &c. provided she be a party, and the rent is reserved to husband and wife, and her heirs. *Stat. 32 H. 8. c. 28.*

Wife ought to join with her husband, in an action for saying of the wife, that she keeps a bawdy house. *Say. Rep. 33.*

If there be judgment, against husband and wife, wife may be taken in execution, without husband. *Say. Rep. 150.*

Feme covert, living apart from her husband, and having a separate maintenance, may contract and be sued, as a feme sole. *Durnf. and East's Rep. 5.*

If costs due upon judgment, or under rule of court, by or against husband and wife, wife, in case she survive husband, is intitled to the costs. *Say. Rep. 126.*

Warrant of attorney to confess judgment, given to feme sole, who marries before judgment entered up, leave to enter it up must be obtained. *Burr. Rep. 1471.*

Feme covert discharged out of custody, because arrested without her husband. *Durnf. and East's Rep. 486.*

Husband and wife cannot join in *assumpsit*, without stating the wife's interest. *2 Bl. Rep. 1236.*

Indeb. ass. for money by wife, at the request of her husband, good. *1 Wils. Rep. 388.*

See Administration.

5. Marriage settlements are usually made of the estate of the husband, &c. To the husband for life, and after his death to the wife for life, and to their issue in remainder, with limitations to trustees to support contingent uses, and leases for terms of years, to raise daughters

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portions, &c. and they are made several ways, as by lease and release, fine and recovery, &c. These settlements the law is ever careful to preserve, especially that part of them which relates to the wife, of which she may not be devested, but by her own fine.

If a woman about to marry a man, to prevent his disposing of her lands, convey the same to friends in trust, and the trustees with the husband after marriage make sale thereof; in this case the Court of Chancery will decree the purchaser to re-convey the lands to the wife. And where a man and a woman intending to marry, enter into articles of marriage, by which the intended husband agrees to settle such lands upon her, &c. and thereupon she marries him; if he die before any settlement made, in pursuance of those articles of agreement, in equity the widow shall have the articles executed, and hold the lands during her life, &c. *Totbil. 43.*

2 Vent. 212.

There are settlements of personal estates, in trustees on marriage, and of money in funds, &c. as well as settlements of lands. And if a man before marriage gives bond and judgment to leave the wife worth 1000*l.* at his death, if she shall survive him, in consideration of a marriage portion; this shall be made good out of the husband's estate, and be satisfied before any debt; so if a person covenant, that if the intended wife shall marry him, and shall happen to survive, he shall leave her worth 500*l.* after his death, action may be brought against his administrator for the money; for here the debt arises by the death of the husband. *Palm. 99.*

2 Sid. 38.

A jointure is a particular settlement of lands made by a man to a woman, in consideration of marriage; which must be to take effect for the life of the wife, in possession or profit, presently after the husband's death, and be made to herself, and none other for her; it must be expressed to be in full of her dower, and in satisfaction thereof; and it may be made before, or after marriage: but if it be made after the marriage, the wife may waive it, and claim her dower. And all other settlements, in lieu of jointure, are jointures at Common Law, and no bars to dower. *Co. Lit.* 36. 4 *Rep.* 1. *Stat.* 27 *H. 8.* c. 10.

Of things whereof a wife shall be endowed, she may have jointure; and if lands, &c. are settled upon her before marriage, in part of her jointure, and after marriage other lands in full, she may take her first jointure lands and dower together, she not having her full jointure till after marriage. Though where a jointure is made of lands according to the statute, before coverture; and after the husband and wife alien them by fine, she shall not have dower in any other lands of her husband; but 'tis otherwise when the jointure is made after marriage. 3 *Rep.* 3. *Co. Lit.* 36, 46.

An estate in fee conveyed to a woman for her jointure, and in satisfaction of dower, is a jointure within the statute 27 *H. 8.* An estate for life, upon condition, may bar the wife, if she accepts it; and so if an estate be made *durante viduitate*. And after the death of the husband, the wife may enter into her jointure, and is not driven to a real action, as she is to recover dower: nor shall her jointure be forfeited by the treason of her husband; as in case of dower. 4 *Rep.* 3. *Co. Lit.* 36, 37.

If

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If a woman conceals her jointure, and brings dower, she is barred of her jointure: but if she be evicted of part of her jointure, she shall have dower *pro tanto*. Married women committing crimes may incur forfeiture of their jointures; and being convict of recusancy, forfeit two parts in three of their jointures and dower. *Co. Lit. 31. Stat. 3 Jac. c. 5. s. 13.*

An infant is bound by her jointure made on her before marriage, so that she cannot wave it; and claim dower; resolved by the house of peers on an appeal from Lord Chancellor *Northington's* decree, on *Thursday 26 May 1762.*

A settlement after marriage of premises upon husband for life, remainder to wife for life, remainder to issue in tail, which are mortgaged three years afterwards, and mortgagee told of settlement, the same is void as against him. *Comp. Rep. 278.*

Having now gone through the large titles of marriage, I proceed to some smaller heads concerning it:

1. Elopements of married women,
2. Divorces between husband and wife.
3. Felony in stealing and marrying women.

1. Elopement is where a woman that is married, of her own accord goes away and departs from her husband, and lives with an adulterer.

A woman thus leaving her husband is said to elope; and in this case the husband is not obliged to allow her any alimony or maintenance out of his estate; nor shall he be chargeable

for

for necessaries for her, as wearing apparel, diet, lodging, &c. And where the same is notorious, whoever gives her credit, doth it at his peril: but on an elopement, the putting a wife in the *Gazette*, or other news-papers, is no legal notice to persons in general not to trust her; tho' personal notice to particular persons given by the husband will be good, nor to be chargeable to them. *Rol. Abr.* 350. *Vent.* 42.

If a woman elopes, and the husband gives publick notice of it, and declares he will not pay any debts of hers she contracts; it hath been held, that if persons trust her afterwards, the husband is not liable to satisfy the debt: yet according to the opinion of chief justice *Holt*, if a wife run away from her husband, and contract debts, and afterwards the husband comes after her and lies with her, tho' but for a night; that will make him chargeable for the debts of the wife. *Sid.* 109. *Mod. Rep.* 124. 6 *Mod.* 171.

Where the wife goes away from her husband, and liveth in adultery with another she shall lose and forfeit her dower; unless the husband of his own free will suffer her to cohabit with him, and be reconciled to his wife. But to prove the reconciliation, on such an elopement, lying together several nights, at several places, it is said shall not avail; if they are not resident or abiding in one house together, &c. If after the elopement of the wife, her husband and she demean themselves as husband and wife, it is evidence of reconciliation. *Dy.* 170, 196.

If a man grants his wife with her goods to another man, and the wife by virtue of the grant lives with the grantee during the life of the husband, this shall incur forfeiture of dower; for she

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she lived in adultery, notwithstanding the grant.
2 *Inst.* 435. 2 *Danv. Abr.* 662.

2. Divorce is a separation of two persons married together, made by law: and there are many divorces mentioned in our books, but they are usually of two kinds, *i. e.* *a mensa & thoro*, from bed and board; and *a vinculo matrimonii*, from the very bond of marriage. *Co. Lit.* 235.

The divorce *a mensa & thoro* dissolves not the marriage; for the cause of it is subsequent, and supposes the marriage to be lawful: it may be by reason of adultery in either of the parties, for cruelty of the husband, &c. and as it doth not dissolve the marriage, so it debars not the woman of her dower; nor bastardizes the issue; or make void any estates for the life of husband and wife, &c. A woman under this divorce may sue her husband in her own name for alimony, and others by her next friend, &c. The divorce *a vinculo matrimonii* absolutely dissolveth the marriage, and makes it void from the beginning, the causes thereof being precedent to the marriage; as precontract with some other person, consanguinity or affinity, impotency, &c. On this divorce, dower is gone; and if by reason of precontract, consanguinity or affinity, the children begotten between them are bastards. *Co. Lit.* 235. 3 *Inst.* 89. 2 *Inst.* 93: 7 *Rep.* 43.

In these last kind of divorces, the wife, 'tis said, shall receive all again that she brought with her, because the nullity of the marriage arises through some impediment, and the goods of the wife were given for her advancement in marriage, which now ceaseth: but here it is where the goods are not spent, and in case the husband

band gives them away during the coverture, it shall bind her. If she knows her goods unspent, she may bring action of detinue for them; and for money, &c. which cannot be known, she must sue in the spiritual court: by this divorce an estate-tail of baron and feme, it has been held, may be extinct. *Dy. 62. Nelf. Abr. 675. Godb. 18.*

If after a divorce *a mensa & thoro*, either of the parties marry again, the other being living, such marriage is merely void; and as in this case the marriage continues, marrying again hath been adjudged within the statute 1 Jac. 1. of felony; where a woman was so divorced, and inhibited, by the sentence not to marry during her husband's life: On a divorce *a vinculo matrimonii*, the parties may marry again; and in divorces for adultery, several acts of parliament have allowed the innocent party to marry again. *2 Leon. 173. Cro. Car. 333.*

If a marriage is voidable by divorce, yet if the husband dies before any divorce, the wife *de facto* shall be endowed: and where there is a divorce, the children of a second marriage may inherit until the sentence is repealed. Sentence of divorce must be given in the Spiritual Court, in the life of the parties, and not afterwards; but it may be repealed there after their deaths. *Co. Lit. 33. 2 Leon. 207.*

3. Where any persons married do marry any other person, the former husband or wife being alive, it is felony: but if a husband or wife are abroad beyond sea, &c. seven years, the one not knowing the other to be living; or there be a divorce of the husband and wife, &c. they are excepted out of the act. As the latter marriage makes this crime; if the first marriage were beyond

Of Marriage, Bastardy,

yond sea, and the second in *England*; the party may be indicted for it here: though if the first marriage be in *England*, and the latter beyond sea, the offender cannot be indicted there.

Stat. 1 Jac. c. 11. Kel. 79, 80. Sid. 171. H. H. P. C. 693, 694. 3 Inst. 39.

To steal or take away any woman, having an estate in lands or goods, or that is heir apparent, against her will, and marry or defile her, is felony by statute: and it is the same, if the taking be against her will, though the marriage was with her consent. And not only the takers, but the procurers, abettors and receivers of the woman before the fact, so now taken away, knowing the same, shall be deemed principal felons. *3 H. 7. c. 2. 39 Eliz. c. 9.*

Taking away any woman child under the age of sixteen years and unmarried, out of the custody and against the will of the father, guardian, &c. the offender shall suffer fine and imprisonment. And an information shall lie for seducing a young man or woman from their parents, against their consents, in order to marry them, &c. *Stat. 4 & 5 P. & M. c. 8. 7. Raym. 473.*

The court granted an information for taking away a *natural* daughter under 16, under the care of her putative father; being of opinion it was within sect. 3. of this statute. *2 Stra. 1167.*

I shall conclude this chapter with the laws and statutes relating to the particular titles of,

1. Bastardy.	} Heads, {	3. Idiots.
2. Infants.		4. Lunatics.

1. Bastardy signifies a defect of birth; objected to one born out of wedlock: for a bastard

is he that is born of any woman not married, so that his father is not known by the order of law: and therefore he shall not be heir, or of kin to any person; he being the first of his family; nor shall he have heirs, but of his own body.

A woman is with child by a man, who afterwards marries her, and then the child is born; this child is not a bastard: but if a man hath issue by a woman before marriage, and after they marry, the issue is a bastard by our law; but legitimate by the civil law. In case one marries a woman grossly big with child by another, and within three days after she is delivered, in our law the issue is now bastard, 'tis otherwise by the spiritual law: and where a child is born within a day after marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is not a bastard, but supposed to be the husband's child. *2 Inst. 96. Danv. Abr. 729. Rol. Abr. 358.*

But if the husband be but eight or nine years of age, or if he be within the age of fourteen, the issue is a bastard: so where a husband is gelt, or hath lost his genitals, &c. which shews an impossibility to get a child; but it must be by special matter. By the Common Law, if the husband be within the four seas, so that by intendment he may converse with his wife, and the wife hath issue, the child will not be a bastard: but he is a bastard who is born of a woman when her husband is over sea, at and from the time of the begetting to the birth of such child. Where a woman lives in adultery with another, her children by such other are bastards; for they are born out of the limits of matrimony; though if husband and wife consent to live

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Of Marriage, Bastardy,

separate, the child born after such separation shall be taken to be legitimate, and not bastards, because the access of the husband shall be presumed. Issue of a second wife or husband, the first being living is a bastard. *Co. Lit. 244. Danv. Abr. 729. Salk. 122. 2 Salk. 483. 1 d. Raym. 395. Carth. 469. 2 Stra. 925, 940. Andr. 9. 2 Stra. 1076. Andr. 8. Andr. 10. Sess. Cas. 235. 2 Sess. Cas. 286. pl. 175. 3 Wils. Rep. 276. Fortesc. Rep. 315. 11 Mod. 106. 2 Burn. 910. 123.*

It hath been held, that if a woman hath a child forty weeks and eight days after the death of her husband, it shall be legitimate; the law having appointed no exact certain time for the birth of legitimate issues. And here, if a woman great with child by her former husband, shall marry another man after his death, the child shall be the lawful child of the first husband: but if a woman be privily with child, it shall belong to the second husband. Where any woman says she is with child by a deceased husband, and with-holds lands from the heir, a writ of *ventre inspiciendo* is to be granted to search her, and try it by a jury of women; and if it be found she shall be kept in custody 'till delivered, &c. *Danv. Abr. 721. See Wils. Rep. 593. Moseley Rep. 391.*

Bastards having gotten names by reputation, may purchase by such names to them and their heirs: and a limitation to them when *in esse*, and known, is good, but not before they are born: they may not take by the name of issue, which must be lawful; nor shall a use be raised to such a reputed son, &c. Special bastardy is triable by the country, in the temporal courts: but general bastardy, whether a person is a bastard or not,

not, and was born in lawful matrimony, &c. upon some question of inheritance, is try'd by the bishop's certificate; after issue joined in a court of law, it is to be transmitted to the ecclesiastical court, to be examined and certified, &c. But the judges shall not award a writ to the ordinary to certify bastardy, till proclamation is issued for all persons having interest therein to make their objections before him against the party, &c. *Co. Lit. 3. 6 Rep. 65. Dy. 374. Hob. 117. Kibb. 64. Stat. 9 H. 6. c. 11.*

Child of married woman may be a bastard, tho' her husband within the four seas. *Say's Rep. 62.*

Married woman may be admitted to prove, that child born of her body, was begotten by a man not her husband, but she cannot to prove that her husband had no access to her. *Say's Rep. 62.*

When bastard dies intestate, the king takes his effects, subject to his debts. *Dougl. Rep. 548.*

Bastards are within the marriage act of 26 *Geo. 2. chap. 33. Durnf. and East's Rep. 96.*

By statutes the two next justices of peace may take order for punishing or the mother and father of a common bastard, and for relief of the parish where born, by a weekly payment, &c. And the father and mother not obeying the order, shall be imprisoned. And where a bastard child is born, churchwardens may seize goods of the reputed father and mother, to discharge the parish: the justices are to send lewd women, having bastards, to the house of correction; but persons able to keep them are not within the statute; and a mother discharging the parish shall not be punished. It is esteemed

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Of Marriage, Bastardy.

murder to conceal the death of a bastard child, when born alive. *Stat. 18 Eliz. c. 4. 7 Jac. c. 4. 13 Ed. 14 Car. 2. c. 12.* perpetrated by 12 *Ann. sess. 1. c. 18. 2 Ld. Raym. 838. 3 Salk. 66. 21 Jac. c. 27. 2 Hawk. Pl. Cr. 438. H. H. P. C. 433.*

Express adjudication, that bastard was born in parish, for relief of whom order is made, not necessary in order of bastardy. *Say's Rep. 61. 310.*

Order of sessions to pay a gross sum, for expences incurred by parish, on account of bastard, good. *Say's Rep. 310.*

Order requiring putative father of bastard to give security for performing order of two justices, not good. *Say's Rep. 310.*

Putative father may take bastard from parish, and maintain such child himself. *Say's Rep. 94.*

Bastard living with mother for nurture, at place of her settlement, must be maintained by his or her own parish, not at expence of his or her mother's. *Doughl. Rep. 7.*

Original order of bastardy may be made at quarter sessions. *Doughl. Rep. 622.*

Order of bastardy stating "Whereas it hath appeared to us," &c. without an express adjudication, that person charged is putative father, is void. *Doughl. Rep. 662.*

When an order of bastardy is quashed, defendant must appear personally, and enter into recognizance to abide the order of sessions. *Bl. Rep. 198.*

Both justices must be present, at the same time and place, when a woman is examined, for not filiating a bastard child. *2 Bl. Rep. 1017.*

2. An infant is a person under the age of 21 years; whose acts are in many cases either void or voidable. *Co. Lit.* 171.

If an infant bargain and sell lands by deed, indented and inrolled, he may avoid it: and where such infant makes a scoffment, he may enter &c. An infant makes a deed, and delivers within age, though he afterwards deliver it again when at full age, this second delivery and deed are void; for the deed must take effect from the first delivery. All gifts and grants, &c. of any infant, which do not take effect by delivery of his hand, will be void; and if made to take effect by delivery of his own hand, are voidable by himself and his heirs, and those who shall have his estate. But if an infant make a lease, paying rent, and after his coming of age he accepts the rent; by this the voidable lease is made good. *2 Inst.* 673. *Co. Lit.* 247. *3 Rep.* 35. *8 Rep.* 43.

An infant may purchase land, being intended for his benefit; but at his full age, he may either agree to and confirm it, or wave or disagree to it; and if he agrees not when at age, his heirs after him may disagree; a lease made, to an infant may be avoided, by waving the land before the rent-day. Infants ought not to be received to levy fines of lands; but if they are admitted, 'twill be good and unavoidable, unless reversed during their minority: a common recovery suffered by an infant by guardian shall bind him; conditions annexed to lands, whether the estate come by grant or descent, are binding to infants; and laches shall prejudice an infant, if he presents not to a church in six months, &c. *Co. Lit.* 2, 172, 380. *Cro. Car.* 307.

Of Marriage, Bastardy,

If an infant enters into bond, pretending to be of full age; though he may avoid it by pleading nonage, he may be indicted for a cheat. An infant may voluntarily bind himself apprentice; but his bond for service shall not bind him: he may bind himself to pay for necessaries, as to eating, drinking, apparel, &c. Though an infant is not obliged to pay for cloaths except it be averred to be for his own wearing, and that they were convenient and necessary for him to wear, according to his estate. Money laid out for necessaries for an infant hath been allowed; when money lent for that purpose hath not: the infant may buy, but cannot borrow money to buy necessaries; for the law will not trust him with money, but at the peril of the lender who must see it thus laid out. *Cro. Car.* 179. *2 Inst.* 483. *Cro. Jac.* 560. *5 Mod.* 368. *Salk.* 386. *10 Mod.* 66. *12 Mod.* 197.

In the prosecution of actions, an infant is to sue by *prochein amy*, or guardian; but always defend by guardian; and he is not to appear by attorney in his own right. If an infant, &c. commit a trespass against the person or possession of another; he must answer for the damage in a civil action: but infants, under the age of fourteen years, are not generally punishable for crimes; although if they are of that age which is the age of discretion, or under those years, having maturity of discretion, they may be punished as felons. *Co. Lit.* 135. *2 Saund.* 212.

A father by deed in his life-time, or by will, may dispose the custody of his infant child under twenty-one years of age, and not married, during the minority, to any persons, not Popish recusants,

recusants, he thinks fit; who may maintain actions of trespass, &c. against unlawful takers away of such children, and take into custody their lands. A guardian in socage at Common Law not thus appointed, continues till the minor accomplishes the age of fourteen years; and then he may chuse his guardian before a judge at his chamber, or in court, or in chancery: and these guardians shall make no waste, or sale of the inheritance, but keep it safely for the heir; they are to take the profits of the minor's lands, &c. to his use, and on accounting for the same, shall have allowance of costs and expences; and if they are robbed, &c. without any default or negligence, they shall be discharged thereof. *Stat. 12 Car. 2. c. 24. Lil. Abr. 655. 2 Lev. 262. Co. Lit. 89.*

Where there hath been some doubt of the sufficiency of a guardian to an infant, the chancery hath required security to be given: and action of account lies against executors, &c. of guardians. *2 Mod. 177. 4 Ann, c. 16.*

Conveyance by infant mortgagee is binding, and cannot be avoided. *Bl. Rep. 575. 3 Burr. Rep. 1794.*

Joint warrant of attorney to confess judgment by infant and another, may be vacated against infant only. *2 Bl. Rep. 1133.*

Infant who lives with, and is properly maintained by her parents, cannot bind herself to a stranger for necessaries. *2 Bl. Rep. 1325.*

Infant lessor in ejectment must give security for costs. *Wils. Rep. 102.*

Plaintiff ought to apply to an infant defendant, or his attorney, to name his guardian, and if neither of them will, court will compel the former. *2 Wils. Rep. 50. Barnes 413, 418, 419.*

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Infant cannot be elected a burgess. *Cowp.* 226.

Infant trustees were ordered by Chancery to convey by fine, same passed accordingly. *Barnes* 217.

Conveyance by infant voidable, not void. 2 *Burr. Rep.* 1795, 1804.

3. An idiot is used in our law for one who is a natural fool, from his birth: and the king shall have the custody of the lands of an idiot, taking the profits during his life, without committing waste, and finding him and his family necessaries; and after his death, shall render the lands to the right heir. This is by statute; and by the common law the king shall also have the custody of the body, goods and chattels of idiots, after office found, &c. 17 *Ed.* 2. c. 9. *Dy.* 302.

But where a person hath once understanding, and becomes a fool by chance or misfortune; the king shall not have the custody of him: and if one have so much knowledge, as to measure a yard of cloth, number twenty pence, or rightly name the days of the week, &c. he shall not be accounted an idiot by the laws of the realm. On a writ returnable in chancery, one may be examined whether idiot or not; and there is a writ *Idiota inquirendo vel examinando*, directed to the sheriff to call before him the party represented to be an idiot, and examine him, and inquire by a jury whether he be of sufficient understanding to manage his estate, and to certify the same into the chancery: after which he may be examined by the lord chancellor. 4 *Rep.* 124. 9 *Rep.* 31. *F. N. B.* 232, 233.

By his prerogative the king hath the lands from the time of the inquisition, and 'tis said, the

the sole interest in granting the estate of an ideot, but not of a lunatick. The use of the ideot's lands is in the king; but the freehold is in the ideot: if he alien his land, the king may have a *scire facias* against the alienée, and re-seise the same into his hands, and the inheritance shall be vested in the ideot; though this must be after he is found by inquisition to be an ideot. *Dy. 302. 5 Rep. 125.*

Ideots not having understanding are incapable to make a will; their deeds, grants and conveyances are voidable, or may be made void: but what they do concerning lands, &c. in a court of record, shall bind themselves, and all others claiming under them. If an ideot contracts matrimony, it shall bind him; and ideots shall be bound to pay for necessaries, in the same manner as infants: a disseint may take away an entry of an ideot, &c. Though where an heir is ideot, any man may make a tender for him; and ideots, &c. ought not to be prosecuted for any crime; because they want knowledge to distinguish good and evil. *Co. Lit. 247. 4 Rep. 111. 2 Inst. 483. Rol. Abr. 357. 3 Inst. 108.*

An ideot cannot appear by attorney; when he sues or defends any action, he must appear in person, and the suit is to be in his name, but followed by others. *2 Sid. 112, 335.*

4. A lunatick is defined to be a person who is sometimes of good and sound memory and understanding, and sometimes not: and so long as he hath not understanding, he is *non compos mentis*. A commission of lunacy shall issue out of chancery, to examine whether the person be lunatick, or not; and to make inquests of his lands, &c. *Dy. 25.*

Of Marriage, Bastardy.

It is ordained by statute, that the king shall provide that the lands of lunaticks be safely preserved, and they and their families maintained by the profits; and the residue shall be kept for their use, and be delivered to them when they come to their right mind, the king taking nothing to his own use, &c. Here the king hath the guardianship of the lands of lunaticks; but not the custody of their lands or bodies; and the guardian of a lunatick is accountable to him, his executors, &c. As a lunatick may recover his understanding, and have discretion enough to govern himself and his lands; therefore the king shall not have the custody of him and his lands; for after he hath recovered his memory, he is to have his estate at his own disposal. *Stat. 17 Ed. 2. c. 10. 4 Rep. 124.*

By the ancient Common Law, a dangerous madman may be kept in prison, till he recover his senses: lunaticks or madmen wandring may be apprehended by a justice's warrant, and locked up and chained; or be sent to their last legal settlement, &c. A lunatick without memory understands not what he does, so that he cannot lawfully promise or contract for any thing: Every deed made by a lunatick, who is *non compos*, is voidable; and his deeds may be avoided by his heir, except he levy a fine, or do any other act of record, &c. But the deed of a lunatick shall not be voidable by himself; he shall not be allowed to work his own disability, by making himself a madman. *Co. Lit. 247. 4 Rep. 126. Stat. 17 Geo. 2. c. 5.*

In criminal cases, the acts of a lunatick shall not be imputed to him; unless he kill, or offer to kill the king, when by our old books he may be guilty of treason; but this is now contradicted;

dicted: and it is said, if one who has committed a capital offence, become lunatick, and *non compos* before conviction, he shall not be tried, and if after conviction, that he shall not be executed. Though if a person feigns himself mad, and refuses to answer for a crime, he shall be taken as one that stands mute, &c. *Co. Lit.* 247. 3 *Inst.* 46. *Hawk. Pl. Cr.* 2. *Hales's Pl. Cr.* 10.

If a lunatick sue an action, it must be sued in his own name; and if an action be brought against a lunatick, he is to appear by attorney, if of full age, and by guardians, if he be under age. *Co. Lit.* 135.

Idiots and lunaticks seised of estates in trust, &c. by order of the chancery may make conveyances thereof. *Stat. 4 Geo. 2. c. 10.* may surrender leases in Chancery or Exchequer, in order to renew the same. *Stat. 29 Geo. 2. c. 31.*

Of the Liberty of the Subject, Magna Charta, and other Statutes.

The Statute of Magna Charta, or the Great Charter made in the ninth Year of King Henry 3.

HENRY, by the grace of God, king of England, lord of Ireland, duke of Normandy and Guyan, &c. To all archbishops, bishops, earls, barons, sheriffs, provosts, officers, and to all bailiffs, and other our faithful subjects, who shall see this present charter, greeting; Know you, that we unto the honour
of

Of the Liberty of the Subject.

of Almighty God, and for the salvation of the
 souls of our progenitors and successors, kings
 of *England*, to the advancement of holy
 church, and amendment of the realm, of our
 mere and free will, have given and granted
 to all archbishops, bishops, earls, barons, and
 all freemen of this our realm, these liberties
 following, to be kept in our kingdom of
England for ever.

C H A P. I.

A confirmation of liberties.

First, We have granted to God, and by
 this our present charter have confirmed, for
 us and our heirs for ever, that the church of
England shall be free, and have all her whole
 rights and liberties inviolable. We have
 granted also, and given to all the freemen of
 our realm, for us and our heirs for ever, the
 liberties under-written, to have and to hold
 to them and their heirs for ever.

C H A P. II.

The relief of the king's tenant of full age.

If any of our earls or barons, or any other
 which hold of us in chief by knight's service
 die, and at the time of his death his heir be
 of full age, and oweth to us a relief, he shall
 have his inheritance by the old relief, that is
 to say; the heir or heirs of an earl, for a
 whole earldom, by one hundred pounds; the
 heirs or heirs of a baron, for a whole barony,
 by one hundred marks; the heir or heirs of
 a knight,

' a knight, for one whole knight's fee, one hundred shillings at the most: and he that hath less shall give less, according to the old custom of the fees.'

CHAP. III.

The wardship of an heir within age.

' But if the heir of any such tenant be within age, his lord shall not have the ward of him or his land, before that he hath taken of him homage: and after such an heir hath been in ward, when he is come to full age, (that is to say, to the age of twenty-one years) he shall have his inheritance without relief, and without fine; so that if such heir being within age be made a knight, yet nevertheless his land shall remain in the keeping of his lord, unto the term aforesaid.'

CHAP. IV.

No waste shall be made by a guardian in ward's lands.

' The keeper of the land of such an heir, being within age, shall not take of the lands of the heir but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods. And if we commit the custody of any such land to the sheriff, or to any other, who is answerable unto us for the issues of the same land, and he make destruction or waste of those things that he hath in custody, we will take of him amends and recompence there-

Of the Liberty of the Subject.

‘ therefore. And the land shall be committed
 ‘ to two lawful and discreet men of that fee,
 ‘ who shall answer unto us for the issues of the
 ‘ same land, or unto him whom we will assign.
 ‘ And if we give or sell to any man the custody
 ‘ of any such land, and he make therein de-
 ‘ struction or waste, he shall lose the same cus-
 ‘ tody: and then it shall be assign’d to two
 ‘ lawful and discreet men of that fee, who also
 ‘ in like manner shall be answerable to us, as
 ‘ aforesaid.’

C H A P. V.

*Guardians shall maintain the inheritance of their
wards: and of bishopricks.*

‘ The keeper, so long as he hath the custody
 ‘ of the land of such an heir, shall keep up the
 ‘ houses, parks, warrens, ponds, mills and other
 ‘ things pertaining to the same lands, with the
 ‘ issues of the said land: and he shall deliver to
 ‘ the heir, when he cometh to his full age, all
 ‘ his land stored with ploughs, and all other
 ‘ things at the least as he received it. All these
 ‘ things shall be observed in the custody of
 ‘ archbishopricks, bishopricks, abbies, priories,
 ‘ churches and dignities vacant, which pertain
 ‘ to us; except this, that such custody shall not
 ‘ be sold.’

C H A P. VI.

Heirs to be married without disparagement.

‘ And heirs shall be married without any
 ‘ disparagement.’

C H A P.

C H A P. VII.

A widow shall have her marriage inheritance and quarentine. The king's widow.

' A widow after the death of her husband,
' without any difficulty, shall have her mar-
' riage, and her inheritance: and shall give
' nothing for her dower, marriage or in-
' heritance, which her husband and she held
' the day of the death of her husband. And
' she shall tarry in the chief house of her hus-
' band, by forty days after the death of her
' husband; within which time her dower shall
' be assigned her, if it were not assigned be-
' fore, or that the house be a castle; and if
' she depart from the castle, then a competent
' house shall be forthwith provided for her,
' in the which she may honestly dwell, until
' her dower be to her assigned, as is aforesaid;
' and she shall have in the mean time her rea-
' sonable estovers of the common. And for
' her dower shall be assigned unto her the
' third part of all the lands of her husband,
' which were his, during the coverture; ex-
' cept she were endowed of less at the church
' door. And no widow shall be distrained to
' marry herself: Nevertheless she shall find
' surety, that she shall not marry without our
' licence and assent, (if she hold of us); nor
' without the assent of the lord, if she holds
' of another.'

C H A P.

C H A P. VIII.

How sureties shall be charged to the king.

‘ We or our bailiffs shall not seize any land
 ‘ or rents for any debt, so long as the present
 ‘ goods and chattels of the debtor do suffice
 ‘ to pay the debt, and the debtor himself be
 ‘ ready to satisfy therefore: neither shall the
 ‘ pledges of the debtor be distrained, as long
 ‘ as the principal debtor is sufficient for the
 ‘ payment of the debt. And if the principal
 ‘ debtor fail in the payment of the debt, having
 ‘ nothing wherewith to pay, or will not pay
 ‘ where he is able, the pledges shall answer for
 ‘ the debt. And if they will, they shall have
 ‘ the lands and rents of the debtor until they
 ‘ be satisfied of that which they before paid
 ‘ for him, except that the debtor can shew
 ‘ himself to be acquitted against the said su-
 ‘ reties.’

C H A P. IX.

The liberties of London, and other cities and towns, confirmed.

‘ The city of London shall have all the old
 ‘ liberties and customs which it hath been
 ‘ used to have. Moreover, we will and grant,
 ‘ that all other cities and boroughs, towns,
 ‘ and the barons of the five ports, and all other
 ‘ ports, shall have all their liberties and free
 ‘ customs.’

CHAP. X.

None shall distrain for more service than due.

'No man shall be distrained to do more service for a knight's fee, nor for any freehold, than therefore is due.'

CHAP. XI.

The common pleas shall not follow the king's court.

'Common pleas shall not follow our court, but shall be holden in some place certain.'

CHAP. XII.

Where and before whom assizes shall be taken. Adjournment for difficulty.

'Assizes of Novel Disseisin and of Mortdancer shall not be taken but in the shires, and after this manner: If we be out of the realm, our chief justices shall send our justices through every county once in the year; which, with the knights of the shire, shall take the said assizes, in those counties. And those things that at the coming of the aforesaid justices, being sent to take those assizes in the counties, cannot be determined, shall be ended by them in some other place in their circuit. And those things, which for difficulty in some articles cannot be determined by them, shall be referred to our justices of the bench, and there be ended.'

CHAP.

Of the Liberty of the Subject.

C H A P. XIII.

Affises of darrein presentment.

‘ Affises of darrein presentment shall be al-
 ‘ ways taken before our justices of the bench,
 ‘ and there shall be determined.’

C H A P. XIV.

How men of all sorts shall be amerced, and by whom.

‘ A freeman shall not be amerced for a small
 ‘ fault, but after the manner of the fault: and
 ‘ for a great fault, after the greatness thereof,
 ‘ saving to him his contentment: and a mer-
 ‘ chant likewise, saving to him his merchan-
 ‘ dize. And any other’s villein than ours shall
 ‘ be likewise amerced, saving his wainage, if
 ‘ he fall into our mercy. And none of the said
 ‘ amerciements shall be assessed, but by the
 ‘ oaths of honest and lawful men, of the vicin-
 ‘ age. Earls and barons shall not be amerced,
 ‘ but by their peers, and after the manner of
 ‘ their offence. No man of the church shall
 ‘ be amerced after the quantity of his spiritual
 ‘ benefice, but of his lay tenement, and after
 ‘ the quantity of his offence.’

C H A P. XV.

Making of bridges and banks.

‘ No town nor freeman shall be distrained to
 ‘ make bridges or banks, but such as of old time
 ‘ and of right have been accustomed to make
 ‘ them

‘ them, in the time of king Henry our grand-
‘ father.’

C H A P. XVI.

Defending of banks.

‘ No banks shall be defended from henceforth
‘ but such as were in defence in the time of
‘ king Henry our grandfather, by the same places
‘ and the same bounds, as they were wont to be
‘ in his time.’

C H A P. XVII.

Holding the pleas of the Crown.

‘ No sheriff, constable, escheator, coroner,
‘ nor any other our bailiffs, shall hold pleas of
‘ the crown.’

C H A P. XVIII.

The king's debtor dying, the king shall be first paid.

‘ If any that holdeth of us lay-fee shall die,
‘ and our sheriff or bailiff do shew our letters
‘ patents of our summons for debt, which the
‘ dead man did owe to us; it shall be lawful for
‘ our sheriff or bailiff, to attach and inroll all
‘ the goods and chattels of the dead, being found
‘ in the said fee, to the value of the same debt,
‘ by the sight and testimony of lawful men, so
‘ that nothing thereof be taken away, until we
‘ be clearly paid off the debt. And the residue
‘ shall remain to the executors, to perform the
‘ testament of the dead. And if nothing be

B b

‘ owing

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‘owing to us, all the chattels shall go to the use
 ‘of the dead, saving to his wife and children
 ‘their reasonable parts.’

C H A P. XIX.*Purveyance for a castle.*

‘No constable nor his bailiff, shall take corn
 ‘or other chattels of any man, if the man be
 ‘not of the town where the castle is; but he
 ‘shall forthwith pay for the same, unless that
 ‘the will of the seller was to respite the pay-
 ‘ment. And if he be of the same town, the
 ‘price shall be paid unto him within forty
 ‘days.’

C H A P. XX.*Doing of castle-ward.*

‘No constable shall distrain any knight to give
 ‘money for keeping of his castle, if he himself
 ‘will do it in his proper person, or cause it to
 ‘be done by another sufficient man, if he may
 ‘not do it himself for a reasonable cause. And
 ‘if we do lead or send him in an army, he shall
 ‘be free from castle-ward for the time that he
 ‘shall be with us in fee in our host, for the
 ‘which he hath done service in our wars.’

C H A P. XXI.*Taking of horses, carts and woods.*

‘No sheriff nor bailiff of ours, nor any other,
 ‘shall take the horses or carts of any man to
 ‘make

‘ make carriage, except he pay the old price
‘ limited. No demesne cart of any spiritual
‘ person or knight, or any lord, shall be taken
‘ by our bailiffs: nor shall we, nor our bailiffs,
‘ or any other, take any man’s wood for our
‘ castles, or other our necessities, but by the
‘ licence of him whose wood it is.’

C H A P. XXII.

How long felons lands shall be bolden by the king.

‘ We will not hold the lands of them that be
‘ convict of felony but one year and a day, and
‘ then those lands shall be delivered to the lords
‘ of the fee.’

C H A P. XXIII.

In what places wears shall be put down.

‘ All wears from henceforth shall be utterly
‘ put down by *Thames* and *Medway*, and thro’
‘ all *England* but only by the sea-coasts.’

C H A P. XXIV.

In what case a præcipe in capite is not grantable.

‘ The writ that is called *præcipe in capite*, shall
‘ be from henceforth granted to no person of
‘ any freehold, whereby any freeman may lose
‘ his court.’

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C H A P. XXV.

There shall be but one measure throughout the realm.

‘ One measure of wine shall be through our
‘ realm, and one measure of ale and a measure
‘ of corn, that is to say, the quarter of *London*.
‘ And one breadth of died cloth, ruffets, &c.
‘ that is to say, two yards within the lists. And
‘ it shall be of weights as it is of measures.’

C H A P. XXVI.

Inquisition of life and member.

‘ Nothing from henceforth shall be given for
‘ a writ of inquisition, nor taken of him that
‘ prayeth inquisition of life or member, but it
‘ shall be granted freely, and not deny’d’.

C H A P. XXVII.

*Tenure of the king in socage, and of another by
knight's service. Petit serjeanty.*

‘ If any do hold of us by fee-farm, or by so-
‘ cage or burgage, and he holdeth lands of ano-
‘ ther by knight's service, we will not have the
‘ custody of his heir, nor of his land, which is
‘ holden of the fee of another, by reason of that
‘ fee-farm, socage or burgage: neither will we
‘ have the custody of such fee-farm, socage or
‘ burgage, except knight's service be due unto
‘ us out of the same. We will not have the
‘ custody of the heir, or of any land, by oc-
‘ casion

‘ cation of any petit serjeanty that any man
‘ holdeth of us by service, to pay an arrow, or
‘ the like.’

C H A P. XXVIII.

Wager of law shall not be without witness.

‘ No bailiff from henceforth shall put any
‘ man to his open law, nor to an oath, upon his
‘ own bare saying, without faithful witnesses
‘ brought in for the same.’

C H A P. XXIX.

*None shall be condemned without trial. Justice
shall not be sold or deferred.*

‘ No freeman shall be taken or imprisoned,
‘ or disseised of his freehold, or liberties, or free
‘ customs, or be outlawed or exiled, or any
‘ otherwise destroyed, and we will not pass sen-
‘ tence upon him, nor condemn him, but by
‘ lawful judgment of his peers, or by the law
‘ of the land. We will sell to no man, we will
‘ not deny or defer to any man either justice or
‘ right.’

C H A P. XXX.

*Merchant strangers, coming into this realm, shall
be well used.*

‘ All merchants (if they were not openly pro-
‘ hibited before) shall have their safe and sure
‘ conduct to depart out of *England*, to come into
‘ *England*, to tarry in and go through *England*,
‘ as

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‘ as well by land as by sea, to buy and sell
 ‘ without any manner of evil tools, by the old
 ‘ and rightful customs, except in time of war.
 ‘ And if they be of a land making war against
 ‘ us, and be found in our realm at the begin-
 ‘ ning of the wars, they shall be attached with-
 ‘ out harm of body and goods, until it be
 ‘ known unto us or our chief justice, how our
 ‘ merchants are treated there in the land mak-
 ‘ ing war against us : and if our merchants be
 ‘ well treated there, theirs shall be likewise
 ‘ with us.’

C H A P. XXXI.

*Tenure of a barony, coming into the king's hand
 by escheat.*

‘ If any man hold of any escheat, as of the
 ‘ honour of *Wallingford*, *Nottingham*, *Boloign*,
 ‘ or of any other escheats which be in our hands,
 ‘ and are baronies, and die, his heir shall give
 ‘ no other relief, nor do any other service to us,
 ‘ than he should to the baron, if it were in the
 ‘ baron's hand. And we in the same wise shall
 ‘ hold it as the baron held it, neither shall we
 ‘ have, by occasion of any barony or escheats,
 ‘ any escheat or keeping of any of our men, un-
 ‘ less he that held the barony or escheat, other-
 ‘ wise held of us in chief.’

C H A P. XXXII.

*Lands shall not be aliened to the prejudice of the
 lord's service.*

‘ No freeman from henceforth shall give or sell
 any more of his land, but so that of the residue
 ‘ of

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‘ of the lands the lord may have the services
‘ due to him, which belong to the fee.’

C H A P. XXXIII.

*Patrons of abbies shall have the custody of them in
the time of vacation.*

‘ All patrons of abbies, who have the king’s
‘ charter of *England*, of advowson, or have old
‘ tenure or possession in the same, shall have the
‘ custody of them when they fall void, as it hath
‘ been accustomed, and as it is before declared.’

C H A P. XXXIV.

*In what case only a woman shall have appeal of
death.*

‘ No man shall be taken or imprisoned upon
‘ the appeal of a woman, for the death of any
‘ other but her husband.’

C H A P. XXXV.

*At what time shall be kept a county-court, sheriff’s
turn, and a leet.*

‘ No county-court from henceforth shall be
‘ holden, but from month to month; and where
‘ greater time hath been used, there shall be
‘ greater. Nor shall any sheriff or his bailiff keep
‘ his turn in the hundred, but twice in the year:
‘ and no where but in the due place and accustomed,
‘ that is to say, once after *Easter*, and
‘ again after the feast of *St. Michael*. And the
‘ view of frank-pledge shall be likewise at the
‘ feast

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‘ feast of St. Michael without occasion ; so that
 ‘ every man may have his liberties which he
 ‘ had, or used to have in the time of king Henry
 ‘ our grandfather, or which he hath purchased
 ‘ since. The view of frank-pledge shall be done,
 ‘ that our peace may be kept ; and that the tith-
 ‘ ing, be wholly kept, as it hath been accustom-
 ‘ ed. And that the sheriff seek no occasions,
 ‘ and that he be content with so much as the
 ‘ sheriff was wont to have for his view making
 ‘ in the time of king Henry our grandfather.’

C H A P. XXXVI.

No land shall be given in mortmain.

‘ It shall not be lawful from henceforth for
 ‘ any one to give his lands to any religious house,
 ‘ and to take the same land again to hold of the
 ‘ same house. Nor shall it be lawful for any
 ‘ house of religion to take the lands of any one,
 ‘ and to lease the same to him of whom he re-
 ‘ ceived it : if any from henceforth give his
 ‘ lands to any religious house, and thereupon be
 ‘ convicted, the gift shall be utterly void, and the
 ‘ land shall accrue to the lord of the fee.’

C H A P. XXXVII.

A subsidy in respect of this charter, and the charter of the forest, granted to the king.

‘ Escuage from henceforth shall be taken like
 ‘ as it was wont to be in the time of king Henry
 ‘ our grandfather ; reserving to all archbishops,
 ‘ bishops, abbots, &c. earls, barons, and all
 ‘ persons as well spiritual as temporal, all their
 ‘ free

‘ free liberties and free customs which they
 ‘ have had in time past, and all these customs
 ‘ and liberties aforesaid, which we have granted
 ‘ to be holden within this our realm, as much as
 ‘ appertaineth to us and our heirs, we shall ob-
 ‘ serve: and all men of this our realm, as well
 ‘ spiritual as temporal (as much as in them is)
 ‘ shall observe the same against all persons in like
 ‘ wise. And for this our gift and grant of these
 ‘ liberties, and of others contained in our char-
 ‘ ter of liberties of our forest, the archbishops,
 ‘ bishops, earls, barons, knights, freeholders,
 ‘ and other our subjects, have given unto us the
 ‘ fifteenth part of all their moveables. And we
 ‘ have granted to them on the other part, that
 ‘ neither we nor our heirs shall procure or do
 ‘ any thing, whereby the liberties in this char-
 ‘ ter contained shall be infringed or broken.
 ‘ And if any thing be procured contrary to the
 ‘ same, it shall be had of no force or effect.’

*Charta de Foresta, or the charter of the
 forest, granted in the ninth year of king
 Henry III.*

I. ‘ **A**LL forests that were afforested by king
 ‘ Henry the Second, shall be viewed by
 ‘ lawful men; and if he hath afforested any other
 ‘ woods than his own demesne, whereby any is
 ‘ prejudiced, they shall be disafforested: saving
 ‘ common of herbage and other things within
 ‘ the forest, to such as have been accustomed
 ‘ to enjoy them.’

II. Cap. 2. ‘ None dwelling out of the forest
 ‘ shall come before the justices of our forest by
 ‘ common summons, unless they be impleaded
 ‘ there

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‘ there, or be sureties for others that are attach-
 ‘ ed for the forest.’

III. *Cap. 3.* ‘ All woods made forest by king
 ‘ *Richard I.* or king *John*, shall be disafforested;
 ‘ except they be out demesne woods.’

IV. *Cap. 4.* ‘ All freeholders having woods
 ‘ in forests, shall enjoy them as they did at the
 ‘ time of the coronation of king *Henry II.* ac-
 ‘ quitted of all purprestures, waites and affarts
 ‘ made before the second year of *Henry III.* and
 ‘ they that make them henceforward shall be
 ‘ answerable to the king for the same.’

V. *Cap. 5.* ‘ Rangers of the forest shall exer-
 ‘ cise their office as it was used at the coronation
 ‘ of *Henry II.* and not otherwise.’

VI. *Cap. 6.* ‘ The lawing of dogs shall be made
 ‘ in forests from three to three years by the view
 ‘ and testimony of lawful men, and not other-
 ‘ wise; and he that hath not his dog lawed
 ‘ shall be amerced 3s. and it shall be done by
 ‘ the usual assise, &c. Three claws of the fore-
 ‘ feet to be cut off by the skin: howbeit such
 ‘ lawing shall not be but where it hath been
 ‘ used from the coronation of *Henry II.*’

VII. *Cap. 7.* ‘ No forester or beadle shall
 ‘ make scotal, or gather garb, oats, corn, lamb
 ‘ or pig, but by the sight and oath of the twelve
 ‘ rangers, when they shall make their range:
 ‘ and there shall be so many rangers assigned for
 ‘ the keeping of forests, as shall seem reason-
 ‘ abled and sufficient for the same.’

VIII. *Cap. 8.* ‘ There shall be only three
 ‘ swain-motes in the year, viz. one court fifteen
 ‘ days before *Michaelmas*, another about *Martin-*
 ‘ *mas*, and the third fifteen days before *Midsum-*
 ‘ *mer*, at the first two of which none shall ap-
 ‘ pear by distress but the foresters, verderors
 ‘ and

‘and gess-takers, and at the other only the foresters and verderors: but the foresters and verderors shall meet every forty days, to see the attachments of the forests, as well for green-hue as hunting; and the swain-motes shall not be kept but in the counties where they have been used to be kept.’

IX. *Cap. 9.* ‘Every one having a wood in the forest may agist it, and take his pawnage there at his pleasure; he may also drive his hogs through the king’s woods, or elsewhere, for that purpose; and if they lie all night in the forest, he shall be questioned for it.’

X. *Cap. 10.* ‘None shall lose life or member for killing of deer, but shall be fined for it, if he have any thing; if not, he shall be imprisoned a year and a day, and (if he can find good sureties) shall then be delivered; but for want of sureties he shall abjure the realm.’

XI. *Cap. 11.* ‘A peer of the realm, being sent for by the king, in coming and returning may kill a deer or two in the forest through which he passeth: howbeit, it must not be done privily, but by the view of the forester, if present; and if absent, by causing one to blow a horn for him, lest otherwise he seem to steal the deer.’

XII. *Cap. 12.* ‘Every freeman may within the forest (upon his own ground) make a mill, spring, pool, marl-pit, dike, or arable land, without inclosing such arable, so it be not to the nuisance of any of his neighbours.’

XIII. *Cap. 13.* ‘Every freeman may have his aviaries of hawks, eagles and herons, and also honey found in his woods within the forest.’

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XIV. *Cap. 14.* 'No chiminage or toll shall be taken in forests but by a forester in fee, that farms his bailiwick, and only of such as buy their bushes, timber, bark or coal, to sell it again, viz. 2*d.* for a car, and 1*d.* for a horse, to be taken half-yearly; and it shall only be taken where it hath used to be so taken, and not elsewhere; neither shall any chiminage be taken of such as carry burthens of bushes, bark or coal, although they sell them, unless they take them out of the king's demesne woods.'

XV. *Cap. 15.* 'All persons outlawed for trespass in forests since *Henry III.* shall be released, finding sureties to offend no more.'

XVI. *Cap. 16.* 'No constable, castellan or bailiff shall hold pleas of forests for green-hue or hunting, but the forester shall attach such pleas, and present them to the verderors of the provinces; who shall inroll them, and present them inclosed under their seals unto the chief justice of the forest, when he comes into those parts to hold pleas of the forest, to be determined before him.'

XVII. 'These liberties of the forest the king grants to all men; saving to persons the liberties and free customs in forests, warrens, and other places, which they have formerly enjoyed.'

And by the *Statute of 1 Edw. 3. c. 8.*

'None shall be taken or imprisoned for vert or venison, unless he be taken with the manner, that is trespassing in the forest, or else duly indicted; and then the warden of the forest shall let him to mainprise until the eyre, of the forest, without taking any thing for his deliverance; and if the warden will not so do,

‘ he shall have a writ out of the chancery of old
‘ ordained for persons indicted, to be bailed
‘ till the eyre.’

‘ If the warden after the writ served deliver
‘ not the person so indicted to mainprise, the
‘ party may have another writ out of chancery
‘ directed to the sheriff to attach the warden to
‘ answer his default before the king at a certain
‘ day; and then the sheriff (the verderors being
‘ called to him) shall deliver the person indicted
‘ by good main-prise, in the presence of the said
‘ verderors, and shall deliver the names of the
‘ mainpernors to the same verderors to answer
‘ in the eyre before the justices.’

‘ If the chief warden be thereof attainted, he
‘ shall be awarded to pay treble damages to the
‘ party grieved, committed to prison, and ran-
‘ somed at the king’s will.’

*The statute De Tallagio non concedendo,
in the time of K. Edward I.*

‘ **N**O tax, tallage or aid shall be levied by
‘ us or our heirs, without the will and
‘ assent of the archbishops, bishops, earls, ba-
‘ rons, knights, burgesses, and other free com-
‘ mons of our realm.’

‘ And all persons shall have their laws, liber-
‘ ties and free customs, as largely as they have
‘ used to have them when they had them best:
‘ and if any statutes or customs have been made
‘ or brought in by us or our predecessors, or
‘ any article in this charter be found contrary
‘ thereunto, they shall be void.’

‘ There is the form of a writ to be directed
‘ to the sheriff, to permit all men to enjoy all
‘ such

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‘ such liberties as they had before ; and a proclamation may issue, that such as claim liberties, shall shew to the justices (at the first assizes, when they shall come into those parts) how they hold them, for which they shall have forty days summons; but if they appear not, their liberties shall be seized in the name of a distress: also there may be another proclamation, that such as complain of the king’s officers shall shew their grievances to the said justices.’

This last clause is by the statute *de quo warranto*, 30 Ed. 1.

The Habeas Corpus statute made in the 31st year of K. Charles II.

‘ THERE having been great delays used by sheriffs, gaolers, and other officers, to whose custody the king’s subjects had been committed, in making returns of writs of *Habeas Corpus*, &c. whereby many persons had been long detained in prison; in such cases where by law they were bailable; for prevention thereof, and the more speedy relief of all persons imprisoned for any criminal matters, it is enacted,

I. ‘ That whensoever any writ of *Habeas Corpus* shall be brought and served upon any officer, or other person, for any one in his custody, or shall be left at the gaol with any of the under-officers, the said officers or their keepers or deputies, within three days after that, (unless the commitment were for treason or felony plainly expressed in the warrant of commitment) on payment of the charges of bringing

‘ bringing the prisoner, or tender thereof, to be
‘ ascertain’d by the judge or court that awarded
‘ the writ, and endorsed on the same, not ex-
‘ ceeding 12 *d.* *per* mile, and upon security given
‘ by the prisoner’s own bond to pay charges of
‘ carrying him back, if he be remanded by the
‘ court, and that he will not make any escape
‘ by the way, shall make return of such writ of
‘ *Habeas Corpus*, and bring the body of the
‘ party committed before the judges or barons
‘ of the court from whence the writ shall issue,
‘ or to such persons before whom the writ is re-
‘ turnable; and shall certify the true causes of his
‘ detainer or imprisonment: but if the place of
‘ imprisonment be beyond twenty miles, and
‘ not above one hundred miles off, then ten days
‘ is allowed for the same; and if further, it shall
‘ be within twenty days, and no longer.’

II. ‘ And persons committed or detained for
‘ any crime (unless for treason or felony expres-
‘ sed in the warrant as aforesaid) in the vacation-
‘ time, may complain to the lord chancellor or
‘ keeper, or any judge, who upon view of the
‘ copy of commitment, or oath of its being de-
‘ nied, shall upon request by such persons, or
‘ any in their behalf, attested and subscribed
‘ by two witnesses, grant a *Habeas Corpus* under
‘ the seal of their respective courts, returnable
‘ immediately; and on service thereof, the of-
‘ ficer within the times before limited is to
‘ bring up such prisoner before the said lord
‘ chancellor or judges, before whom the writ is
‘ made returnable, with the causes of his com-
‘ mitment; and thereupon, within two days
‘ after he shall be brought up, the prisoner shall
‘ be discharged from his imprisonment, on
‘ entering

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entering into recognizance with one or more sureties, to appear in the court of king's bench the term following, or at the next assises, sessions or general gaol delivery, or such other court for the county where the offence is cognizable; into which court the writ, return and recognizance aforesaid, shall be certified; unless it shall appear that the party is detained upon a legal process or warrant, for such matters or offences which are not bailable by law.

III. 'Provided always, that if any person shall neglect to pray a *Habeas Corpus* for his enlargement, by the space of two terms after he is committed, he shall not have any such writ in time of vacation, in pursuance of this act.'

IV. 'If any officer or officers shall refuse to make their returns, or to bring the body of the prisoner as aforesaid, according to the command of the writ, within the times aforesaid; or upon demand made by the prisoner, or any in his behalf, shall refuse to deliver a true copy of the warrant of commitment, within six hours after demanded, such officers, gaolers, &c. in whose custody the prisoner shall be detained, shall forfeit for the first offence 100 l. and for the second offence 200 l. to the party grieved, and be rendered incapable to hold their offices: the penalties to be recovered by action of debt, bill, plaint or information, in any of the king's courts at *Westminster*, wherein no essoin, &c. or stay of prosecution shall be admitted or allowed.'

V. 'And no person, who shall be delivered and set at large by *Habeas Corpus*, shall be again imprisoned for the same offence, by any person other than by legal order and process of

‘ of such court, wherein he shall be bound by
‘ recognizance to appear, or other court having
‘ jurisdiction of the cause; and if any other
‘ person shall knowingly imprison again the
‘ person delivered or set at large, they shall for-
‘ feit to the prisoner 500*l.* to be recovered as
‘ aforesaid.’

VI. ‘ Persons committed for high treason or
‘ felony, plainly and especially expressed in the
‘ warrant, upon prayer in open court the first
‘ week of the term, or first day of the sessions
‘ of *Oyer & Terminer* or gaol delivery, to be
‘ brought to trial; if they are not indicted the
‘ next term, sessions of *Oyer & Terminer*, or
‘ gaol-delivery after such commitment, the
‘ judges, upon motion made in court the last
‘ day of the term or sessions, shall set them at
‘ liberty upon bail, unless it appear upon oath,
‘ that the king’s witnesses could not be produ-
‘ ced that term or sessions: and if any such
‘ persons committed as aforesaid, upon such
‘ prayer aforesaid, shall not be indicted and tried
‘ the second term or sessions after commitment,
‘ they shall be discharged from their imprison-
‘ ment.’

VII. ‘ But nothing in this act shall extend to
‘ discharge out of prison any person charged in
‘ debt or other action, or with process in any
‘ civil cause, but that after his acquittal for his
‘ crime, he shall be kept in custody for such
‘ other suits.’

VIII. ‘ If any person or persons, subjects of
‘ this realm, shall be committed to any prison,
‘ or be in custody of any officer, for any cri-
‘ minal matter, the said person shall not be re-
‘ moved from the said custody into the custody
‘ of any other officer: unless it be by *habeas*

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' *corpus*, or some other legal writ, or where the
 ' prisoner is delivered to the constable to be car-
 ' ried to gaol, &c. or when any person is sent by
 ' order to the house of correction, or removed
 ' from one prison to another in the same county,
 ' in order to a trial or discharge; or in case of
 ' sudden fire, infection or other necessity. And
 ' persons making out and signing any warrants
 ' for removal, contrary hereto, or counter-sign-
 ' ing the same, and the officers obeying or exe-
 ' cuting them, shall incur the forfeitures before
 ' mentioned, both for the first and second of-
 ' fence, to the party grieved.'

IX. ' And any prisoner may move for and ob-
 ' tain his *habeas corpus*, as well out of the *Chan-*
 ' *cery* or *Exchequer*, as out of the courts of *King's*
 ' *Bench* or *Common Pleas*; and if the lord chan-
 ' cellor or any judge or baron, shall deny any
 ' writ of *habeas corpus* required to be granted as
 ' aforesaid, they shall forfeit to the party grieved
 ' 500*l.* recoverable in manner aforesaid.'

X. ' And it is declared, that writs of *habeas*
 ' *corpus* may run into any county palatine, the
 ' cinque ports, and other privileged places of
 ' *England*, and into the isles *Jersey* or *Guernsey*.'

XI. ' No subject of this realm shall be sent
 ' prisoner into *Scotland*, *Ireland*, or into any
 ' parts beyond the seas, which are or may be
 ' within or without the dominions of his ma-
 ' jesty, his heirs or successors: and if any of the
 ' said subjects be so imprisoned, it is illegal, and
 ' every such person shall for such imprisonment
 ' have an action of false imprisonment, against
 ' him by whom he shall be committed, de-
 ' tained, imprisoned, sent prisoner or trans-
 ' ported, and against all persons that shall frame,
 ' contrive, write, seal or countersign any war-
 ' rant

‘ rant for such commitment, or shall be ‘advis-
 ‘ sing, aiding or assisting in the same; and shall
 ‘ have judgment to recover treble costs, besides
 ‘ damages, which damages shall not be less than
 ‘ 500*l.* in which action no delay or stop of pro-
 ‘ ceedings, nor no injunction, protection or pri-
 ‘ vilege, &c. shall be allowed; and the person
 ‘ or persons so offending as aforelaid, being law-
 ‘ fully convicted thereof, shall be disabled to
 ‘ bear any office of trust or profit within the
 ‘ realm, or dominions thereunto belonging, and
 ‘ incur the pains, penalties and forfeitures or-
 ‘ dained by the statute of *præmunire* made in
 ‘ the 16th year of *Richard II.* and be incapable
 ‘ of any pardon from the king, his heirs or suc-
 ‘ cessors.’

XII. ‘ This act shall not extend to any per-
 ‘ son who by contract in writing shall agree
 ‘ with any merchant or owner of a plantation,
 ‘ &c. to be transported; and shall have received
 ‘ earnest upon such agreement: nor to persons
 ‘ convicted of felony, and praying to be trans-
 ‘ ported beyond the seas, who may be so trans-
 ‘ ported into any parts notwithstanding this sta-
 ‘ tute; nor to the imprisonment of any person
 ‘ before the time limited for the commence-
 ‘ ment of the act, or any thing thereto rela-
 ‘ ting; nor to persons resident in this realm,
 ‘ that shall have committed any capital crime
 ‘ in *Scotland* or *Ireland*, &c. but that such per-
 ‘ sons may be sent to receive trial as before this
 ‘ act.’

XIII. ‘ And persons offending against this act
 ‘ shall not be impleaded for any offence, unless
 ‘ the same be done within two years at most
 ‘ after the offence was committed, in case the
 ‘ party grieved shall not be then in prison; and

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‘ if he shall be in prison, then within two years
‘ after his delivery out of prison or decease.’

XIV. ‘ After the assizes proclaimed for any
‘ county, no person shall be removed from the
‘ common gaol upon any *habeas corpus*, pursu-
‘ ant to this act, but shall be brought thereupon
‘ before the judge of assize in open court : but
‘ after the assizes are ended, any person detain-
‘ ed may have a *habeas corpus*, according to the
‘ direction and intention of the act.’

XV. ‘ If any information, suit or action, be
‘ brought against any person or persons for of-
‘ fences against this law, the defendants may
‘ plead the general issue, and give the special
‘ matter in evidence ; and the said matter shall
‘ be as available to all intents, as if they had
‘ pleaded or alledged the same matter in bar
‘ or discharge of such information, suit or ac-
‘ tion.’

XVI. ‘ Persons appearing to be committed as
‘ accessory before the fact, to any petit treason
‘ or felony, or upon suspicion thereof, which
‘ shall be specially expressed in the warrant of
‘ commitment, shall not be removed or bailed
‘ by virtue of this act, or in any other manner
‘ than they might have been before the making
‘ of the same.’

Two things I shall observe upon this statute :

1. That altho’ the constable by his own au-
thority, without any warrant of commitment,
may carry an offender to gaol, and this was the
method of securing prisoners, before that there
were any justices of the peace; yet since the in-
stitution of that magistrate, it is better that they

be carried before him; to be sent by him to gaol by warrant of commitment; otherwise, they have a right to be bailed upon this act, whatever the offence may be.

2. That the warrant of commitment ought to set forth the cause specially: that is to say, not for treason or felony in general, but treason for counterfeiting the king's coin, or felony for stealing the goods of such a one to such a value, and the like; that so the court may judge thereupon whether or no the offence is such, for which a prisoner ought to be admitted to bail. *Burn's Just. qto. 104.*

Of the King and his Prerogative, and the Officers and Ministers of Justice under him.

THE king is he who hath the highest rule over the whole land. Our king being above all others, he hath therefore many singular privileges and preheminences in him beyond all other persons: and he, for the excellency of his person and greatness of his office, has ascribed to him by law some of the attributes even of God; as sovereignty and power, omnipresence, immortality, verity and justice, &c. But this is to be understood, in his publick or political capacity; for in his private or natural capacity, the law looks on him as mortal, and subject to the infirmities of other men. *3 Shep. Abr. 44.*

Of the King and his Prerogative.

As to the prerogatives of the king, they are called *jura regalia*, or *insignia coronæ*; and are inseparably annexed to the crown, so that none but the king himself may have and use them: and the particular power and prerogative of the king hath its exercise in these things.

1. As the king is head of the state.
2. As he is supreme head of the church.
3. As lord paramount of all lands; and grants of the king.
4. His debts how paid, and acts construed in civil cases, &c.

1. It is the king's royal prerogative to make war or peace; to send and receive ambassadors, and make leagues and treaties with foreign states: and as head of the state, he calls, continues, prorogues and dissolves parliaments; and all statutes are to have his royal assent, which he may refuse to give to a bill; but his denial is that he will advise upon it, and not an express negative. *Co Lit.* 110.

In calling or dissolving parliaments, declaring war and peace, &c. his proclamation has the effect of a law; though he cannot by proclamation introduce new laws; yet he may thereby enforce old statutes discontinued; and he may dispense with a penal statute, wherein his subjects have not any interest. The king may take the benefit of any statute, although he be not named; but acts of parliament do not bind the king, if he is not specially named, unless they concern the commonwealth, suppress wrong or fraud, &c. in which cases they are binding to him. 3 *Inst.* 162. 2 *Inst.* 743. 5 *Rep.* 14. 7 *Rep.* 32.

It

It is his prerogative alone to dispose and govern the militia of the kingdom: and he hath the command of all forts, and places of strength, &c. Also authority in the making and casting of ordnance. He gives commissions for levying men and arms, by sea and land; and disposes of all magazines, ammunition, castles, fortresses, ships of war, and publick money: the king may lay embargoes on shipping, but then it must be *pro bono publico*; he may, if he see cause, open or shut the sea ports, and forbid the passage of his subjects over sea, without licence, &c. The ports he may not grant to a subject, but shall appoint officers for the custody thereof, under him. 12 Rep. 34. 11 Rep. 86. Salk. 32.

He hath power to make an alien free-born; and to grant letters of safe conduct to foreign parts: he can put a value upon the coin which is made by his authority, and make foreign coin current by proclamation; and to make money, the law gives the king all mines of gold and silver; or where the gold and silver in mines is of the greater value, which are called royal mines. Plowd. 314.

All writs and processes, commissions, &c. are in the king's name; and he may erect courts of justice, which shall proceed according to the common law: he may make and create universities, colleges, counties, boroughs, fairs, markets, &c. And no forest, chase or park can be made, or castle built, without the king's leave. The king by his prerogative may incorporate a whole city, parish, &c. or part of it, and grant and annex to such corporations divers franchises: tho' they may not under colour thereof set up a monopoly, which is against law. Jenk. Cent. 285. 4 Inst. 294. Ney. 182.

Of the King and his Prerogative.

The king is the fountain of honour, and has the sole power of conferring dignities and honourable titles; as to make dukes, earls, barons, knights of the garter, &c. And he names, creates, makes and removes the great officers of the government: he determines rewards and punishments; moderates laws, and pardons offenders. But the king cannot pardon murder, where appeal is brought by the subject; and pardons of felony, &c. shall be granted only, where the king may lawfully do it, according to his coronation oath. *Co. Lit.* 165. 2 *Inst.* 316. *Stat.* 14 *Ed.* 3.

The king may grant the duties of a port to a subject, in consideration of repairing the port. *Cowp. Rep.* 108.

The king in council can no otherwise punish any of the governors of his foreign possessions, than by removing them, and taking away commission, which they may hold, during pleasure. *Cowp. Rep.* 175.

The king has a right to a legislative authority over a conquered country, till some act done amounting to a waiver of it by him. *Cowp. Rep.* 313.

Whether the crown may not by virtue of it's prerogative grant an exemption from being impressed. *Cowp. Rep.* 520, 521.

And altho' the king hath an interest in every subject, and a right to his service, he cannot discharge the right of a subject, or hinder him of a remedy the law gives him. *Salk.* 168.

2. As supreme head of the church, our king hath power to call a national or provincial council; and by his royal assent the canons made in convocation have the force of laws: and to him the last appeal is made. 4 *Inst.* 325. *Danv. Abr.* 73.

The

The king hath this prerogative in the convocation of the clergy; that when it is called, it is by his writ; it may not make any canons without his licence; if the king pleases he may sit there, as he doth in the parliament; and he hath a negative voice, as he hath in parliament. The archbishop of *Canterbury*, who is president, prorogues and dissolves it by the king's direction; and the clergy called to the convocation shall have the same privileges as members of parliament. *Crompt. Jur.* 4. *Stat.* 8 H. 6. c. 1. *Eq. Caf. Abr.* 349. (A.) pl. 1. 3 *Chan. Rep.* 22. fol. edit. 1736. 4 *Pryn. Reg. Writs* 644.

By his prerogative, the king hath the supreme right of patronage all over *England*; and is the founder and patron of all bishopricks, &c. so that none can be made a bishop but by his nomination: and the election of bishops is to be by the king's *Conge d'Eslire*, or licence to elect the person named by the king; and if the dean and chapter fail to make election, the king may nominate, &c. by letters patent. But the dean and chapter having made their election, certify it to the king, and the archbishop, &c. and then the king gives his assent under the great seal. *Co. Lit.* 96. 25 H. 8. c. 20.

The king has not only the choice and making of all bishops, but of deans, and the like clergymen: and he may license a new bishop to retain his old parsonage in *Commendam*: and where a bishop may hold the profits of a benefice for a time, by way of *Commendam*, this cannot be done without the king's licence. The custody of the temporalities of every bishop and archbishop, during the vacancy of the sees, belongs to the king, and he may grant it away; and the

Of the King and his Prerogative.

the king may present to a void advowson, when the temporalities are in his hands. *Davis* 57. *F. N. B.* 34. *Co. Lit.* 398.

He may now make any bishop, or other person in holy orders, a privy councillor, justice of oyer and terminer, justice of peace, &c. or give them power to execute any temporal authority. The king, according to the statutes may dispense with plurality of benefices, and non-residence of clergymen, where there are two or more benefices with cure: appropriations of church benefices, made by consent of the patron and ordinary, must be with the king's licence. When the patron of a church neglects to present to the same in six months; the bishop of the diocese, or on his default, the archbishop is to collate within the like time; and he not doing it, the king shall present to the church. *Cro. Jac.* 552. *11 Rep.* 10. *2 Rol. Abr.* 360.

Churches are founded by the king, and he licenses others to found them, exempt from the ordinary's jurisdiction; and he hath the tithes of forests and places extraparochial, which he may grant by letters patent: also the king shall pay no tithes, &c. *Cro. Eliz.* 511.

3. The king is lord paramount of all the lands in *England*; and all estates for want of heirs, or by forfeiture, escheat to him: he shall have the lands of felons, &c. convict; and the goods of felons and fugitives; goods and chattels of pirates; wreck of the sea, &c. *Stat.* 17 *Ed.* 2. *4 Inst.* 136.

All lands are said to be holden of the king; lands in the king's possession are free from tenure; and the king may not be jointenant with any one: where the title of the king and of a common person concurs, his title shall be preferred.

ferred. No distress can be made upon the king's possession; but he may distrain out of his fee in other lands, &c. and may take distresses in the highway. Goods and chattels may go in succession to the king, though they may not to any other sole corporation. *Co. Lit.* 1, 30, 90. *Finch* 83. *2 Inst.* 131.

The king may grant a thing in action, which another cannot; and reserve a rent to a stranger, &c. But he cannot grant or take any land, (not cast upon him by descent) but by matter of record: and the king may not grant an annuity to charge his person, which is not chargeable like the person of a subject; though he may grant it out of the revenue of the excise, &c. The grant of the king is taken favourably for him, and most strongly against another; and he may avoid his own grant for deceit. *4 Rep.* 54. *Inst.* 186. *Plowd.* 243. *Salk* 58.

The king's grant is good for himself and successors, though his successors are not named: but if a grant is made by the king, and a former grant is in being of the same thing, if it be not recited, the grant will be void; yet there may be a *non obstante* to a former grant, if the king is deceived in his grant, as where it contains more than was intended to be granted, &c. it is void: and the king's grants may be void by reason of uncertainty; where debts and duties are granted, without saying in particular what duties, &c. Though when there is a particular certainty preceding, they shall not be destroyed by any uncertainty or mistake which follows it. *Yelv* 13. *Dyer* 77. *5 Rep.* 94. *12 Rep* 46. *Mod Rep.* 195.

A grant of the king to a corporation, that they shall not be impleaded for any cause arising there, or elsewhere than before themselves, &c. this

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this binds not the king, where he is party: and the king may not by his grant exclude himself from prosecuting pleas of the crown; for it concerns the publick government. *Kelw.* 88.

Dy. 376.

4. The king's debt shall be satisfied before that of a subject, for which there is a prerogative writ; and until his debt be paid he may protect the debtor from the arrest of others. But by statute a common person may sue the king's debtor, notwithstanding he hath a protection, and recover judgment against him; tho' he cannot have execution, unless he gives security to pay the king's debt. If a debtor hath not a writ of protection, he may be in execution for a common person, as well as the king: and the debt of the king ought to be in equal degree with that of his subject, to have preference. *Co. Lit.* 130. *Stat.* 25 *Ed.* 3. c. 19. 33 *H.* 8. c. 39. *Cro. Car.* 283.

In whose soever hands the goods of the king come, their lands are chargeable, and may be seised for the same: and the king is not bound by sale of his goods in open market. No prescription of time runs against the king; he is not within the statute of limitation of actions: he may sue in what court he pleases, and cannot be nonsuit, as he is supposed to be present in all his courts; the king may have such process in his suit, as no other person but himself can have, in any case: and in his pleading he need not plead an act of parliament, tho' a subject is bound to do it. 2 *Inst.* 713. 11 *Rep.* 74. *Finch* 82, 476. 4 *Rep.* 75.

Action lies not against the king, but a petition to him in chancery instead thereof: and it is lawful for any subject to petition the king for redress,

redress, where he finds himself grieved by any sentence or judgment. The king's title is not to be tried, without warrant from the king, or assent of the attorney general; there are no costs allowed against the king; no entry will bar him; and no judgment is ever final against him, but with a *salvo jure regis*; and in the case of others, they king may issue a command to the judges, not to proceed 'till he is advised, where his right may be prejudiced, &c. 2 Inst. 187, 424. Hob. 220. Finch 460.

The king's only testimony of any thing done in his presence is of as high a nature and credit as any record; whence it is that in all writs or precepts sent out for the dispatch of justice, he useth no other witnesses than himself, as *teste meipso*, &c. The king cannot be a minor or under age; and in him the law will see no defect, negligence or folly. Co. Lit. 41, 57.

These prerogatives and others arise to the king, from the reason of the Common Law; which allows that to be law almost in every case for the king, which is not so for the subject: but the king's prerogative doth not extend to any thing injurious to his subjects; for the king by our law can do no wrong. Finch 85.

The king or queen may make laws, by authority of parliament, to bind the crown, &c. Kings of *England* are to be protestants, and join in the communion of the church of *England*; and the king's coronation oath is settled by statute. Stat. 1 W. & M. st. 2. c. 2. s. 10.

Of the King and his Prerogative.

Prerogative of the Queen and Prince.

THE queen in our law is either she that holds the crown of this realm by right of blood or who is married to the king; the first of which is called *Queen Regnant*, and the last *Queen Consort*: she who holdeth by blood is, in construction of law, the same with the king, and hath the like regal power and authority; but the queen consort is inferior to the king, and his subject. *3 Inst 7. 1 Mar. cap. 1.*

By the Common Law, the queen as the king's wife, partakes of several prerogatives above other women: she is a publick person, exempt from the king; and capable of lands or tenements of the gift or grant of the king her husband, which no other feme covert is: and she is of ability, without the king, to purchase or grant lands, and make leases; she may have in herself the possession of personal things, during her life, &c. But both her real and personal estate goes to the king after her death; if she do not in her life-time dispose of them, or devise them away by will. *Co. Lit. 3. 31. 133. Rol. Abr. 912.*

The queen may sue and be sued alone, in her own name only, by *Præcipe*, not by petition; and no writ of right is to be directed to her, but to her bailiff: she shall not find pledges in an action; or be amerced as another shall be. In a writ of *Quare Impedit* brought by the queen, on her being disturbed in presenting to a church some lay plenarty is no plea against her: acts of parliament relating to her need not be pleaded; for the court must take notice of them, as they do those that concern the king, because

because she is a publick person. *Finch* 86.
2 *Inst.* 361. 8 *Rep.* 28.

In case a tenant of the queen aliens part of his land to one, and part of it to another; the queen may distrain in any one part for the whole, as the king may do: and she is not bound by the statute of *Marlbridge* against driving of a distress out of the county. If the king take an alien to wife, she shall have the queen's dowry; and the queen shall pay no toll, &c. 4 *Rep.* 23. *Plowd.* 124, 231. *Co. Lit.* 133.

As for the *Prince of Wales*, to plot his death is high treason. He is not restrained by the statute 1 *Hen.* 4. chap. 6. concerning the king's grants: the judges are to take notice of an act of parliament made for him, without pleading it, and the like. 8 *Rep.* 28.

And the king's other children have some privileges more than other men's children; being born beyond sea, they are inheritable to land here, &c. 4 *Rep.* 23. 1 *Inst.* 132.

A *Provision* not only for the king's household, is settled by parliament; but is ordain'd also for the queen. *Stat.* 1 *Geo.* 3. c. 1. 2 *Geo.* 3. c. 1.

The privileges of the nobility.

THE nobility and peerage of this kingdom is created by the king, either by writ or letters patent. The calling up a lord by writ is the most antient way, and gives a fee-simple in a barony, to him and his heirs, without words of inheritance; but the king may limit it to heirs male, or the heirs of the body; and if he dies before he sits in parliament, his blood is not ennobled: but the creation by letters patent

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patent is good, and makes the peerage sure, tho' he never sits in parliament; and his heirs shall inherit the honour, pursuant to the words of the patent. *Ca. Lit.* 16. 2 *Inst.* 48. 4 *Bac. Abr.* 229. 3 *Seld.* 1478, 1726. *Styl.* 222, 253. *Mo.* 767.

All peers of the realm are looked upon as the king's hereditary counsellors; the king and whole kingdom have an interest in the peerage of every lord: and the privileges belonging to our nobility, beyond other men are very great. The person of a peer, as well out as in parliament time is privileged from all arrests, unless for treason, felony or breach of the peace, &c. and this privilege is so extensive in respect of his person, that the king may not restrain any peer of his liberty, without order of the house of lords, except it be in cases of treason, &c. 6 *Rep.* 52. 4 *Bac. Abr.* 228, 231. 2 *Ld. Raym.* 1247.

Peers are not to be arrested upon mean process, or on execution for debt or trespass, because they are presumed not only to attend the king and the publick affairs; but the law doth presume they have sufficient lands, in which they may be distrained: but they may be apprehended in criminal cases. And tho' a peer may not be arrested in his body; his estate may be sequestred for debt, &c. upon a prosecution after a dissolution and prorogation of parliament, or adjournment for above fourteen days; when he refuses to appear and answer, on a bill of complaint exhibited in the Chancery, Exchequer, &c. 6 *Rep.* 53. *Stat.* 12 & 13 *W.* 3. c. 3.

Though *stat.* 12 & 13 *W.* 3. by which statute, liberty is given of commencing suit by bill,

bill, against persons having privilege of parliament, does only mention knights, citizens, and burgeses expressly, the subsequent words, or any other person having privilege of parliament, do not extend to a peer, because he is a person of superior rank to all the persons, who are expressly mentioned; but the court was of opinion, that the practice which has for many years been established, viz. to commence a suit against a peer by bill, and to declare against him, not as being in the custody of the marshal, but, as having privilege of parliament, is founded upon a very right construction of the statute, and that it ought to be adhered to. *Say. Rep. 64. Cowp. Rep. 844.*

Privilege of peerage will be noticed without pleading. *Loff's Rep. 49.*

Suits may be brought against any peer, or member of parliament, or their menial servants, &c. in the intervals of parliament, or of sessions, being above fourteen days; and the courts after dissolutions, or prorogations, may give judgment, and award execution: and where any plaintiff shall be stay'd from prosecuting his suit, he shall not be nonsuited, but upon the rising of the parliament may proceed to judgment, &c. Also no proceedings in law against the king's debtor, shall be delayed under colour of any privilege: only the person of a peer shall not be arrested, or imprisoned thereupon, &c.

11 Geo. 2. c. 24.

Every lord of parliament is allow'd his clergy in all cases, where others are excluded by the Stat. 1 Ed. 6. c. 12. except for wilful murder: and it is said the lord *Merley*, who was tried for murder, and found guilty of manslaughter, was discharged without clergy. For treason

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committed by a peer of the realm, he shall be tried by his peers, lords of parliament: and if a nobleman be indicted of murder or felony, his trial shall be by his peers; but on an appeal of felony, which is the suit of the party, he shall be tried by an ordinary jury of twelve men. *S. P. C. 130. Sid. 277. 2 Inst. 49. Stat. 9. H. 3. c. 29.*

In many cases the protestation of honour shall be sufficient in noblemen; as in trials of peers, they proceed upon their honour, not on oath: and if any peer is a defendant in a court of equity, he shall put in his answer upon his honour (tho' formerly it was to be on oath): and in action of debt upon account, the plaintiff being a peer, it shall suffice to examine his attorney upon oath, and not himself: tho' where a peer is to make an affidavit, or to be examined as a witness, he must be upon his oath like another person. *9 Rep. 49. 3 Inst. 29. 2 Salk. 512. Wilf. Rep. 1462. Mod. 99. 3 Keb. Rep. 631. Freem. Rep. 422. pl. 566. 16 Vin. Abr. 293. pl. 3. 4 Bac. Abr. 237.*

A writ of *Subpoena* shall not be awarded against a peer out of Chancery in a cause; but a letter from the lord chancellor in lieu thereof. No *Capias* or exigent can be sued out against peers of the realm, in actions of debt or trespass; and no essoin lies against them: in any trial where a peer is plaintiff or defendant, there must be returned on the jury at least * one knight, or it

* Lord Ch. Just. Holt said, the reason a knight was to be on a jury, when a peer was concerned, was for the security of the commons, for a knight was presumed to be a man of courage, and not afraid to look a peer in the face. *11 Mod. 102.* However this challenge is now taken away by Stat. 24 Geo. 2. c. 18. s. 4.

shall

shall be cause of challenge; but peers on the trial of a peer may not be challenged, as jurors may in case of a common person. A peer may not be impanelled upon any inquest, though the cause hath relation to two peers. *Gilb. Chanc. 65. Har. Chanc. Pract. 50. 4 Bac. Abr. 232, 238. 2 Hawk. Pl. Cr. Chap. 43. s. 4, 11.*

If any person shall divulge or tell false tales of any lord of parliament, by which dissension may happen, or any slander arise, the offender shall be imprisoned, &c. and such lord may bring his action of *Scandalum Magnatum* in the name of the king, and in his own name, and recover large damages; and the defendant shall be otherwise punished. *Stat. 12 R. 2. c. 11.*

No peer can be assessed towards the militia, but by assessment made by six or more peers: and the houses of peers shall not be searched for conventicles, but by warrant under the sign manual, or in the presence of the lord lieutenant of the county, or one deputy lieutenant and two justices of the peace, &c. *9 H. 3. 13 & 14 Car. 2. c. 3.*

It was lawful by the Common Law for any peer to retain as many chaplains as he would; but by statute their number is limited, viz. a duke to have six chaplains, a marquiss or earl five, viscount four, baron three, &c. *Stat. 31 H. 8. c. 10.*

Now I come to the officers and ministers of justice under the king, which I shall treat of in the order following:

1. Of the judges of the law.
2. Of sheriffs of counties.
3. Of coroners and their duty.

D d 2

4. Of

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4. Of justices of the peace.
5. Of constables, &c.

1. A judge is a chief magistrate in the law, to try civil and criminal causes, and punish offences: and our king hath the nomination and appointment of judges. *Co. Lit.* 56.

The king in all cases doth judge by the judges; and judges are to give sentence according to law, that which by law they know to be right, and what is alledged and proved: a judge ought not to judge in his own cause, or in pleas wherein he is party. *Co. Lit.* 71. *7 Rep.* 27. *Stat.* 18. *Ed.* 1.

If a judge is doubtful or mistaken in matter of law, a stander-by may be allowed to inform the court, as *Amicus Curie*. But no judge shall generally be excepted against, or challenged; or have any action brought against him for what he does as judge. And to kill a judge of either bench, or of assise, &c. in their places administering justice, is treason: also drawing a weapon only upon a judge in any of the courts of justice, the offender shall lose his right hand, forfeit his lands and goods, and suffer perpetual imprisonment. *2 Inst.* 178, 422. *Co. Lit.* 294. *25 Ed.* 3. c. 2.

The judges are freed from all prosecutions whatsoever, except in the parliament, where they may be punished for any thing done by them as judges: and there bribery in a judge, which is a very high offence is punishable by loss of office, fine and imprisonment. If a judge, who hath no jurisdiction of the cause, give judgment of death, and award execution, which is executed, such judge is guilty of felony; and also the officer who executes the sentence.

sentence. Though judges are not in any way punishable for a meer error of judgment. 12 Rep. 24. Vaugh. 138. Cro. Jac. 65. H. P. C. 35. 2 Hawk. 4.

Judges of the Common Law have no ordinary jurisdiction to examine witnesses at their chambers; though by consent of parties and rule of court they may on interrogatories; and some things done by judges at their chambers, in order to proceedings in court, are accounted as done by the court. They are to have a paper of the causes which are to be spoken to in court; and where special matter arises upon reading the record of a cause, so that the judges are not for the present satisfied of the law, they order paper-books to be made and delivered them, containing copies of the record, &c. that they may the better consider of the matters in contest. 2 Lil. Abr. 90, 91.

Our judges are to execute their offices in proper person, and cannot act by deputy, as the judges of ecclesiastical courts may: yet where there are divers judges of a court of record, the act of every one of them is effectual, especially if their commission do not expressly require more; but what a majority rules when present, is the act of the court. 1 Roll. Abr. 382. 2 Hawk. 3.

A judge of B. R. cannot be made by writ, but by commission under the great seal; but he may be discharged by writ *sub magno sigillo*.

Proceedings in a cause are not stayed by the summons of a judge. Say. Rep. 166. but *quare*, and see 2 Bl. Rep. 954.

In an action brought against a judge of record, for an act done in his judicial capacity, he may plead, that he did it as judge of

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record, which will be a sufficient justification. *Cowp. Rep.* 172. See *Lofft's Rep.* 56.

Judge may order in vacation, that defendant shall plead such plea, as he will stand by. *2 Burr. Rep.* 782.

2. A sheriff is the chief officer, under the king, of a shire or county, for keeping of the peace, and execution and service of writs and processes, &c. At Common Law, sheriffs were chosen by the county, as knights of parliament now are; but by statute, they are to be made by the king; and the chancellor, treasurer and barons of the *Exchequer*, &c. nominate three persons yearly for each county, out of which the king chuses one: and by statute they are to have sufficient lands in the county where chosen, to answer the king and his people. *Stat. 9 Ed. 2. ft. 2. 14 Ed. 3. c. 9.*

The power of a sheriff is judicial, and ministerial: his judicial authority consists in trying and determining causes in his county courts; and in preserving the peace of the county, he being by the Common Law the principal conservator of the peace there; and he is to assist the justices of peace, and raise the *Posse Comitatus* to suppress riots, &c. Though his judicial power, as conservator of the peace, is seldom used; being commonly executed by justices of peace: His ministerial power relates to executing writs out of the king's courts; and herein he is not to dispute the validity of any writ, but must execute it: for he must not let a person escape, tho' taken on an erroneous process; but shall be excused by reason thereof, in false imprisonment. *Co. Lit.* 174. *2 Inst.* 193, 452. *5 Rep.* 64.

Besides

Besides their ministerial office to execute process, &c. Sheriffs are to proclaim statutes; return juries, for trials in civil and criminal cases; make returns of writs for electing knights of the shire, &c. And they are to collect the rents of the king, seize profits of lands forfeited, goods of felons, &c. To levy the king's debts, and be accountable to the king for all issues and profits of their counties; for which they are to give up their accounts in the exchequer: by statute, sheriffs shall have allowance on their accounts, for executing the king's writs, levying estreats, &c. Their accounts shall not be delayed; and 4000*l.* yearly is set apart at the exchequer, and allowed the sheriffs of the several counties, to help pass their accounts. Also they are to see that criminals be executed, and observe the order of law in putting them to death. *Dr. & Stud. ch. 41. 23 H. 6. c. 9. 3 Geo. c. 15.*

The officers under the sheriff are an under-sheriff, bailiffs, gaoler, &c. for whom he is answerable. As to the under sheriff, his power is the same with that of the high sheriff, he acting in his stead; but all returns by the under-sheriff are in the name of the high sheriff; the under-sheriff is removeable at pleasure, and some say but in nature of a general bailiff errant to the sheriff in the whole county, as other bailiffs are over particular districts. The under-sheriff is to file a warrant of attorney for his high sheriff in all the courts of *Westminster*, by an attorney of each court; and ought always to have his deputy attendant in courts, to receive and execute their commands, give account of business, &c. And sheriffs shall not take any money or reward for the places of under-sheriff,

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gaoler, bailiffs, &c. 4 Inst. 114. 2 Lil. Abr. 511, 513. Stat. 3 Geo. c. 15.

If a sheriff do not make a return of writs, or making a false return, he shall be amerced; or the party may bring action of the case against him: sheriffs shall let persons to bail upon reasonable sureties; and where a sheriff takes a bail-bond of two good men of visible estates at the time of taking it, if they afterwards become insolvent, the sheriff shall be excused. When any sheriff is chargeable in his life-time for a personal tort; there the action for it dieth with the person; but if a sheriff levies money on a *feri facias*, and dies, action may be brought against his executors for the money, being a duty: and if an under-sheriff procure goods taken in execution to be appraised at under value, and deliver them to the plaintiff accordingly; for this oppression of the defendant indictment will lie. Sheriffs are not to take above 1 s. in the pound where under 100 l. nor more than 6 d. per pound if above that, for levying an extent or execution, and 1 s. in the pound of the yearly value of lands, for executing a writ of *Habere facias Possessionem*, &c. where the whole exceeds not 100 l. per Annum, and 6 d. if above. 10 Rep. 70. Cro. Eliz. 808. Cro. Car. 539. Cro. Jac. 426. 29 Eliz. c. 4. 3 Geo. c. 15.

Sheriffs may not continue in their offices above one year; which also extends to under-sheriffs: and no sheriff is to act as a justice of peace of the county, during his shrievalty; nor an under-sheriff, &c. be attorney in any of the king's courts, so long as he bears the office; though such as are attornies may practice in the name of others. No sheriff at assize time, shall

shall keep a table for any but those of his own retinue; nor make any present to any judge, &c. or have above forty servants in liveries, or under twenty attending him. On the deaths of sheriffs, under-sheriffs are to act in their names, 'till others are appointed, and be answerable. *Stat. 14 Ed. 3. c. 7. 42 Ed. 3. c. 9. 1 M. c. 8. 1 H. 5. c. 4. 13 & 14 Car. 2. c. 21.* perpetuated by 1 *Jac. 2. c. 17. f. 4. 3 Geo. ft. 2. c. 15.*

Sheriff may return a writ, but cannot do any compulsory act out of his county. *Say. Rep. 55.*

Actions for breach of duty in office of sheriff, must be brought against high sheriff, though cause of action be default of under-sheriff or bailiff. *Cowp. Rep. 403.*

Action lies not against sheriff, upon promise to execute bill of sale to plaintiff's nominee. *Cowp. Rep. 406.*

Legal and proper mode of compelling sale by sheriff, is by writ of *venditioni exponas*. *Cowp. Rep. 406.*

If bailiff on *Fi. Fa.* against goods of *A.* take those of *B.* action of trespass lies against sheriff. *Dougl. Rep. 40.*

Sheriff is answerable for official acts of under-sheriff. *Dougl. Rep. 43. n. See Loffi's Rep. 81.*

Service of rule to return writ on sheriff's agent in town, not good service on sheriff. *Dougl. Rep. 420.*

Sheriff not liable to be called upon for return of process, beyond six lunar months after expiration of his office, and day of going out of office to be reckoned part of the time. *Dougl. Rep. 463.*

Sheriff

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Sheriff or bailiff not liable to action for arresting certificated bankrupt, a peer of the realm, a discharged insolvent, or a person who took benefit of 20 Geo. 3. chap. 64. altho' party be privileged from arrest; party in a cause, or witness, coming to, or returning from a court of justice. *Dougl. Rep.* 671.

Sheriff not intitled to poundage, if judgment irregular. *Lofft's Rep.* 253.

Nor till goods be sold. *Lofft's Rep.* 333.

Sheriff's return not traversable. *Lofft's Rep.* 374.

Non est inventus by sheriffs of preceding year, false return by sheriffs of present. *Lofft's Rep.* 83.

Sheriffs obliged to let persons out on bail, and punishable for taking money for so doing. *Burr. Rep.* 926, 927.

Sheriffs of *London* and *Middlesex*, to return their writs and bring in body within *four* days. *3 Burr. Rep.* 1921.

Sheriff's bailiff bound to make affidavit of service of process, if required. *1 Bl. Rep.* 438.

3. A coroner is an ancient officer of this realm that deals wholly for the king and crown. There are generally four coroners in a county; in some counties fewer, and in some but one, according to usage: and they are elected at the county court, in full county, by the freeholders, upon the king's writ.

Coroners are to be men of good ability, and have lands in fee in the county where chosen, to answer all people; and if insufficient, the county shall answer for them: there are also special coroners, within divers liberties, as well
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as the ordinary officers in every county; as the coroner of *the verge*, which is a certain compass about the king's court, &c. and some corporations and colleges are licensed by charter to appoint their coroners within their own precincts. 2 Inst. 174. 4 Inst. 271.

Their authority, like that of sheriffs, is judicial and ministerial; judicial, where one comes to a violent death, and to take and enter appeals of murder, pronounce judgment upon outlawries, &c. And they are to be inquire of the lands and goods and escapes of murderers; of treasure trove, wreck of the sea, * deodands, &c. The ministerial authority is where coroners execute the king's writs, on exception to the sheriff, as being party to a suit, kin to either of the parties, and on default of the sheriff, &c. And as ministers, coroners must all join in their acts; but as judges, they may divide and act separate. On the defaults of sheriffs, coroners are to impanel juries; and in case of two coroners, if one is challenged, the other may execute the writ, &c. yet both make but one officer. 4 Inst. 271. 4 Rep. 79. 9 Rep. 11. 93. Lev. 399. Salk. 144.

* Not much countenanced in Westminster hall. Fost. Cr. Law, 265, 266.

Court refused to quash inquisition before coroner, whereby it was found, that only the near fore wheel of a waggon did move to the death of a man. Say. Rep. 250.

Coroner not liable to serve on juries. Dougl. Rep. 190.

If coroner neglects to take inquisition of the cause, justices of gaol delivery, oyer and terminer, may, and both inquisitions traversable; but quære if those taken on *felo de se* are. 1 Burr. Rep. 18, 19

Inquisition taken secretly and privately shall be quashed. 1 Burr. Rep. 19.

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As the sheriff in his turn might inquire of all felonies by the Common Law, saving the death of a man: so the coroner can inquire of no felony but of the death of a person, and that *super visum corporis*. When the coroner hath notice given him of a person slain, or suddenly dead, he is to go to the place where, and shall by his warrant to the bailiffs, constables, &c. summon a jury out of the four or five neighbouring towns or villages, to make inquiry upon view of the body; and the coroner and jury are to inquire into the manner of killing, and all circumstances that occasioned the party's death; as who were present, whether the dead person was known, where he lay the night before, &c. and examine the body, if there be any signs of strangling about the neck, or of cords about the members, &c. Also all wounds must be viewed, and inquiry made with what weapons given. *Stat. 4 Ed. 3. 2. 4 Inst. 271.*

And to discover the truth, the coroner may send his warrant for witnesses, and take their examination in writing; and if any appear guilty of the murder, he shall inquire what goods and lands he hath, and then the dead body is to be buried: a coroner may likewise commit the person to prison, who is by his inquisition found guilty of the murder; and the witnesses are to be bound by recognizance to appear at the next assizes, &c. When the jury have brought in their verdict, the coroner is to enrol and return the inquisition, whether it be of murder, manslaughter, &c. to the justices of the next gaol-delivery of the county; or certify it unto *B. R.* where the murderer shall be proceeded against. If a coroner doth not come to inquire, having notice of the death of any person, he may be fined

fined and imprisoned by the justices; and he shall be fined and imprisoned for not certifying his recognizances, and the evidence and inquisition taken before him, to the court where they ought. 2 *Rol. Abr.* 32. *Cro. Eliz.* 135. *Stat. 1 & 2 P. & M. c. 13.*

The coroner is to sit on the body of every prisoner that dies in prison, and inquire if he died by the duress and ill usage of the gaoler, which is murder: and the coroner's inquisition being final, he ought to hear counsel, and evidence on both sides. If the body of a dead person is buried before the coroner comes, he may in convenient time take up the same, in order to view it; and in such case the town shall be amerced; as it shall be if the body is suffered to lie so long that it stinks, or cannot be judged how it came by his death, &c. A coroner may find any nuisance by which the death of a man happens; and the township may be amerced: if one is slain in the day-time, and the murderer escapes, the town where done shall be amerced, and the coroner is to inquire thereof on view of the body. 3 *Inst.*

91. *Bro. Coron.* 167. 2 *Danv. Abr.* 209. *Nels. Abr.* 536. *Stat. 3 Hen. 7. c. 1.*

If a body is drown'd, and cannot be found to be viewed, the inquisition must be taken by justices of the peace, on examination of witnesses, &c. A coroner's inquest may be quashed, whereupon he is to make a new one; and for mismanagement of the coroner, filing of the inquisition may be stopp'd: if he hath been guilty of bribery, &c. Commissioners may be ordered to take a new inquisition, on the testimony of witnesses. By statute, coroners concealing felonies, &c. are to be fined, and suffer one year's imprisonment: they shall not take above 13s. 4d. fee,
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of the goods of the murderer, or out of the amercement of the vill for the escape, if he be gone; and where a person is slain by misadventure, the coroner is to take no fee, on pain of 40*s.* 5 *Rep.* 110. *Mod. Rep.* 82. 3 *H.* 7. c. 1. 1 *Hen.* 8. c. 7. and see now *Stat.* 25 *Geo.* 2. c. 29. concerning his fees and punishment.

4. A justice of peace is a person appointed by the king's commission to keep the peace of the county where he dwells; but these persons are rather commissioners of the peace, of whom some of the greatest quality are of the *quorum*, because business of importance cannot be done without the presence of one of them.

And a justice of the peace is a judge of record, for he may take a recognizance of the peace, which none but a judge of record can do; and hence they are called justices, being before the 1 *Ed.* 3. called conservators of the peace. The power of appointing justices of peace is only in the king, tho' they are generally made at the discretion of the lord chancellor, by the king's leave; and the king may appoint in every county of *England* as many as he shall think fit. *Dalt. Just.* 8. *Lamb.* 186.

The general commission of the peace, by statute, began 1 *Ed.* 3. tho' before that time there were conservators and particular commissioners of the peace in certain places, but no commission throughout *England*: at first the number of justices was not above three or four in a county; afterwards they were limited to six in every county, whereof two were to be knights, and two men of the law. But by *Stat.* 14 *R.* 2. c. 11. eight justices of peace were to be assigned in every county; and the number of justices has greatly increased since their first institution, they

they being now without limitation. *Co. Lit.* 174. *Dalt. c. 5. 1 Ed. 3. c. 16.*

Justices of peace are to be resident in the county where appointed; and to keep their sessions four times a year, viz. the first week after *Michaelmas*, the *Epiphany*, *Easter*, and *St. Thomas* the martyr, called *Becket*. They are to be the most sufficient persons within the county, and of the best reputation; and they must have certain estates in lands to qualify them; no steward of any lord shall be in the commission of peace. And justices of the peace were formerly to be allowed 4*s.* a day during their attendance at the quarter-sessions, to be paid by the sheriffs of counties, &c. Now the qualification of justices is 100*l.* a year estate, freehold or copyhold, in possession for life, or greater estate, or certain term of twenty-one years, above incumbrances; or acting as justices shall forfeit 100*l.* And attornies, &c. are incapable to be justices of peace. *Stat. 2 H. 5. st. 1. c. 4. 18 H. 6. c. 11. 12 R. 2. c. 11. 5 Geo. 2. c. 18. 18 Geo. 2. c. 20.*

By virtue of one *assignavimus*, or clause in their commission, every justice of peace hath a separate power, and may do all acts concerning his office apart and by himself; and even may commit a fellow justice upon treason, felony or breach of the peace: and this is the ancient power which conservators of the peace had at Common Law: but it has been held, that one justice of peace cannot commit another justice, for breach of the peace; tho' the justices in sessions may do it. By virtue of another *assignavimus*, or clause in the commission, two or more justices of the peace (one of the *Quorum*) have a joint power to enquire by jury of all offences mentioned

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mentioned in their commission; to take indictments, grant process, &c. and to hear and try the offences, which are matters to be transacted at the quarter-sessions: and by the statutes, in many cases they are impowered to act where their commission doth not reach, the statutes themselves being a sufficient commission. *Lamb. Just.* 385. *Jenk. Cent.* 174. *Wood's Inst.* 80.

The statutes of * 4 *Hen.* 7. c. 12. 33 *Hen.* 8. c. 10. and 37 *H.* 8. c. 7. give a further general power to justices of peace, than is expressed either in their commission or any particular statute. The particular statutes are to be executed as they direct; wherein if no express power is given to any one justice, he can admonish only; and if not obeyed, may make presentment of the offence upon the statute, and with his fellow justices hear and determine it in sessions; or he may bind the offender to the peace, or the good behaviour: some statutes impower one justice of peace alone to act; some require two, three or four justices, &c. And where a special authority is given to justices of peace, it must be exactly pursued; or the acts of the justices will not be good. 2 *Salk.* 475.

A justice of peace has no need to shew his commission, when he justifieth the doing things as a justice; for the commission remains with the *custos rotulorum* of the county, and he is called by commission in open assise, or sessions. Where the statutes refer a trial to the justice's discretion, it is said he may examine upon oath: and in some cases the testimony of a justice of peace is of as great force, and sometimes greater

* Qu. If in force since the death of king Henry 7.

than an indictment of twelve men on oath, viz. in case of presentment of highways, force and riots. A justice certifying into the *King's Bench*, that such a one broke the peace in his presence, the party shall be put to his fine, without a traverse to the same. *Crompt. 120, 132. Lamb. 387. Dalt. 9.*

Justices in their sessions, might originally hear and determine felonies; but they at this time only try petty larcenies, other felonies being of course tried at the assises: but out of sessions they commit all felons in order to trial; and it is incident to the office of justices of peace, to commit offenders; they also bind over prosecutors, to the assises, take and certify examinations and informations, recognizances, &c. and if they neglect their duty herein, they shall be fined. A justice may commit a person that doth a felony in his own view, without warrant; but if it be on the information of another, he must make a warrant under hand and seal for that purpose: and if a justice issues his warrant to arrest a felon, tho' the accusation be false, the justice is excused where a felony is committed; but in case there be no accusation, action will lie against the justice. *Dalt. c. 11. 2 Leon. 187.*

Where a justice of peace acts to compel another to perform any thing required by law, as if he commands one to be imprisoned, &c. he cannot act out of the jurisdiction of his county; but he may take informations any where, to prove offences in the county where committed, and he principally resides, or take a recognizance to prosecute. Justices have a discretionary power of binding to the good behaviour, or breaches of the peace, &c. and may take recog-

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nizance with great penalty of a dangerous person, for keeping the peace; and for default of sureties, they may be committed to prison: but a man giving security in the court of B. R. may have a *superseas* to the justices; so on giving it to other justices, &c. *Cro. Car.* 213. 2 *Lil. Abr.* 131.

Surety of the peace, and binding to the good behaviour, a justice may grant at the request of any person, or demand, *ex officio*: when granted on request of another, he that demands it is to make oath of blows given, or that he goes in fear of his life, or some bodily harm, &c. And persons doing any thing tending to the breach of the peace, by affrays, assaults, fighting or quarrelling, barretors, rioters, &c. may be required to enter into recognizances with sureties to keep the peace, and be of the good behaviour: so persons of ill fame, and suspected to break the peace, and who live a scandalous life, by frequenting gaming-houses, &c. Night-walkers, common drunkards, common whores, cheats, those who live idly, &c. But misbehaviours must relate to the publick peace; and abusive language, as calling one rogue, rascal, lyar, &c. are not breaches of it. *Dalt.* 263, 268. 292. 4 *Inst.* 181.

If one makes an assault upon a justice, he may apprehend the offender, and send him to gaol till he finds sureties for the peace: and where a man abuseth a justice by words before his face or behind his back, in relation to his office, he may be bound to the good behaviour; and if he abuse the justice of peace in the execution of his office, the offender may be indicted and fined. To say of a justice of peace, he doth not understand law, &c. is indictable; and attempts

tempts against justices are punishable by indictment and fine at the sessions. *Crompt.* 149. 4 *Rep.* 16. 3. *Mod.* 139.

Justices have power to grant warrants to bring persons before them; for arresting and apprehending criminals; levying penalties on offenders against statutes; and making commitments, &c. And if complaint and oath be made by a person of goods stolen, and that he suspects they are in such a house, and shews the cause of his suspicion; the justice of peace may grant his warrant to a constable, &c. to search in the place suspected, and to attach the goods and party in whose custody they are found, and bring them before him or some other justice to give an account how he came by them, and further to abide such order as to law appertains: but a general warrant to search all places, is not safe or strictly lawful. 2 *Hale's Hist. P. C.* 113, 114.

A justice may make a warrant to bring a person before him only, and it will be good; though it is usual to bring offenders before him, or any other justice of the county, &c. If a justice grants any warrant beyond his authority, the officer must obey; but not if it be where the justice hath no authority: justices may not intermeddle with property; if they do, it is actionable. But justices of peace may make and persuade an agreement in petty quarrels and breaches of the peace, where the king is not intitled to a fine: though they may not compound offences, or take money for making agreements. 5 *Reg.* 60. *Noy* 103. 3 *Salk.* 217.

Justices shall not be regularly punished for any thing done by them in sessions as judges: and if a justice of peace be sued for any thing done

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in his office, he may plead the general issue, and give the special matter in evidence; and if a verdict goes for him, or the plaintiff be nonsuit, he shall have double costs. Though justices of peace may be indicted for taking money, or any corrupt practice: and if a justice of peace is guilty of any misdemeanor in his office, information lies against him in *B. R.* where he shall be punished by fine and imprisonment. Also for contempt of laws, &c. Attachment may be had against justices of peace out of the King's Bench, on motion of the attorney general, &c. *Stat. 21 Jac. c. 12. Keb. 727. Sid. 192. 24 Geo. 2. c. 44.*

The particular power of justices by the statutes relates to alehouses, apprentices, artificers, badgers, bail, bakers, bankrupts, bastards, behaviour, brewers, bricks and tiles, bridges, buggery, burglary, burials, burning of houses, butchers, callico, candles, carriers, *certiorari's*, church and church-wardens, clipping and coining, clothiers, coals, coffee, constables, conventicles, corn, cottages, county-court, curriers, customs, deer-stealers, dissenters, distillers, drunkenness, dyers, excise, false tokens, felony, fish, forcible entry, forestallers, fuel, game and gaming, gaols, goldsmiths, gunpowder, hackney coaches, hawkers and pedlars, hay, hedge-breakers, highways, hops, horse-stealing, houses of correction, hue and cry, informers, juries, labourers, leather, lights, lord's day, lotteries, malt, non-conformists, oaths, papists, parliament, perjury, pewter, plague, poor, post-letters, purveyance, quakers, rapes, recognizances, recusants, religion, riots, robbery, sacrament, salt, scavengers, schoolmasters, seamen, servants, sewers, ships,

ships, shoemakers, silkthrowers, soldiers, squibs, stamp duty, swearing, taxes, taylors, tithes, tobacco, treason, trophy-money, vagrants, victuallers, wages, warrants, watch, watermen, weights and measures, windows, wine, wood-stealers, wool, wrecks, &c. See *Burn's Justice*.

And there are justices of peace within liberties, who are such in *cities*, and other *corporate towns*, as the others are for the county; and their authority is all one within their several territories and precincts, having besides, the assise of ale and beer, wood, victuals, &c. 27 *H. 8. c. 25*.

But the king, notwithstanding his charter to the mayor and others to be justices of peace within a city, may grant a commission of the peace especially in that city or county, to have jurisdiction with the justices by charter: and if all the justices of a corporation are concerned in a force, and will not enquire thereof, the next justices of the county shall do it; for the denying it, is a forfeiture of their exemption from the county. 2 *Hale's Hist. P. C.* 47. 6 *Mod.* 164.

If a justice dwell in any city, which is a county of itself within the county at large, he may grant warrants, &c. at his dwelling house, tho' out of his county for which he is a justice. The judgments of justices of peace in their sessions, shall not be removed into *B. R.* without entering into recognizance of 50*l.* to prosecute with effect, and pay costs if affirmed. 9 *Geo. c. 7.* 5 *Geo. 2. c. 19.*

Court will not give leave to file information against a justice of peace, unless he has acted from a corrupt or partial motive. *Say's*

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Rep. 26, 217. *Dougl. Rep.* 427. See *Loffi's Rep.* 38.

Information against justice for taking insufficient bail for the forth coming of a prisoner. *Say's Rep.* 243.

For disobeying a *mandamus*. *Say's Rep.* 267.

Attorney at law may act as a *charter* justice. *Loffi's Rep.* 620.

Sessions have a right of judging upon appeal, with same latitude of discretion, as two justices. *1 Burr. Rep.* 246.

Court of *B. R.* will intend every thing in favor of justices upon their orders. *1 Burr. Rep.* 246.

They have no need to give any reason, and they shall be presumed to have acted on proper grounds. *1 Burr. Rep.* 247.

No action will lie against justices, tho' their poor's rate and assessment be bad, if never appealed from. *1 Burr. Rep.* 581, 587.

Justices cannot be trespassers, by what officers afterwards do. *1 Burr. Rep.* 587.

Justices of peace, &c. may, upon being sued for official acts, plead the general issue, and give the special matter in evidence. *Dougl. Rep.* 307. *Loffi's Rep.* 373.

Before a justice of peace is allowed to pay money into court, it must appear he is sued as justice, and for misconduct in his office. *2 Bl. Rep.* 859.

5. A constable is an officer over a hundred or in a parish, for preservation of the peace; there being two sorts of these officers, high constables, and petty constables.

The statute of *Winchester*, 13 *Ed. 1. c. 6.* appoints for conservation of the peace, two constables in every hundred, called high constables;

and continuance of time, and increase of people and offences, hath under these made others necessary in every town, called petty constables; which are of like nature, but of inferior authority to the others, and are as it were assistants to them: also there are other officers in towns and parishes, as headboroughs, tithingmen, &c. and where there is no constable, their duty is the same; but they seem generally to be for particular boroughs, tithings and villages. *Dalt. 3.*

It is said, constables were conservators of the peace before justices of peace were made; but some of our law books mention that constables were only subordinate officers to the conservators of the peace, as they are now to the justices. In places where headboroughs are appointed, they are a kind of constables, though constables are the principal officers; and there are some things which a constable has power to do, that headboroughs and tithingmen cannot intermeddle with: indeed in the absence of the constable, they are chiefly to attend the service of the office; and in a town or parish, having no other parish officer, the tithingman, &c. is in effect the constable of the place. *Dalt. 3. Owen 105.*

Anciently high and petty constables were appointed by the sheriff in his tourn, and sworn there, as well as in the leet: a constable of common right is to be chosen by the jury in the court-leet; and if he be present, and refuse to be sworn in his office, the steward may fine him: if he is absent when elected, he shall be sworn before justices of peace; and then if such constable refuse to be sworn, and to take upon him the office, the homage must present his refusal

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at the next court, and there he shall be amerced. At the court-leet a high constable may be chosen by the steward, on presentment of the jury, where custom warrants it; but where such courts are not kept, or there is a neglect in chusing him, the justices at their quarter-sessions may chuse and swear a high constable: and he may be sworn out of sessions, by warrant from thence. *Salk. 175.*

If constables, headboroughs, &c. die, or go out of the parish, or in case of refusal to serve the office, two justices of peace are to swear new ones, 'till the lord of the manor hold a court-leet, or until the next quarter-sessions, and then the steward or justices may either approve of them, or appoint others to continue in for one year; and if any of them continue above a year, the justices of peace may discharge them, and put in others until the lord of the manor holds a court. *Stat. 13 & 14 Car. 2. c. 12.*

All constables are appointed yearly: the high-constables are now generally chosen and sworn by the justices at their sessions; and petty constables and tithingmen, in each town, parish or vill, and choice of them properly belongs to the court-leet; but they may be elected by the parishioners, and sworn by a justice, &c. who on just cause may remove them. A village having no constable, the justices of peace, by order of sessions, appointed one to serve there; for justices have always exercised a power of appointing constables: and they are officers to the justices of peace, as the sheriff is to the court of King's Bench. *4 Inst. 267. Salk. 175, 176.*

The persons elected to this office ought to be men of honesty, knowledge and ability; not infants,

infants, lunaticks, &c. and they are to be men of substance, and not of the meaner sort, also shall be resident where chosen; and if they be not thus qualified, upon complaint, two justices may appoint other persons. But physicians, apothecaries, &c. are excused by statute from bearing the office of constable; or other parish offices; and justices of peace, attornies and officers of the courts at *Westminster*, barristers at law, &c. are privileged from serving this office; and poor, old, sick and decrepit persons, are exempted from it. 8 Rep. 41. 5 Mod. 96. 2 Hawk. P. C. 63.

A constable may make a deputy; but the constable is answerable for him, and the deputy must be sworn: and constables may appoint a deputy, or person to execute a warrant, when by reason of sickness, &c. they cannot do it themselves. Dissenters chosen to the office of a constable, &c. scrupling to take the oaths, are to make deputies for the execution of the office, who shall comply with the law in this behalf: and a woman made constable, by virtue of a custom, that the inhabitants of a town shall serve by turns, on account of their estates or houses, may hire one to execute the office for her, and the custom is good. Sid. 355. 2 Hawk. 63. 1 W. & M. c. 18.

One who is resiant within a private leet, within an hundred, is not therefore exempt from serving the office of constable of the hundred. Cowp. Rep. 13.

A custom to elect such an one constable, good. Cowp. Rep. 13.

Aldermen of *London*, not compellable to serve the office of constable. Dougl. Rep. 538.

Resiants

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Resiants of leet not excused from serving as constable to hundred. *Lofft's Rep.* 420.

Constable of night guilty of a misdemeanor, in suffering a street-walker delivered to his custody by watchman, to escape. *2 Burr. Rep.* 866, 867.

Action will not lie against a constable or other peace officer, for an arrest, on a real charge of felony, though without a warrant, and though no felony had actually been committed. *Dougl. Rep.* 359, 360.

Constables, &c. being sued for official acts, may plead the general issue, and give special matter in evidence. *Dougl. Rep.* 307. *Lofft's Rep.* 373.

The office of *Highb Constable* consists in these things: he hath the direction of the petty constables, headboroughs and tithingmen within his hundred. In general, his duty is to keep the peace, and apprehend felons, rioters, &c. He is to make hue and cry after felons: and take care that the watch be duly kept in his hundred; and that the statutes for punishing rogues and vagrants be put in execution. He ought to present unlawful gaming, tippling and drunkenness, bloodshed, affrays, &c. He is to execute warrants and precepts directed to him by justices of the peace; and make returns to the sessions of the justices to all the articles contained in his oath, or that concern his office: and he is to issue his precept to the petty constables, to make presentments of offences, and cause them to make their returns; also to prepare lists of jurors, levy gaol-money, &c. *Dalt. c.* 28.

He shall return all victuallers and alehouse-keepers that are unlicensed; and such persons as entertain inmates in houses, who are likely to be charge-

chargeable to parishes: he must present the defaults of petty constables, headboroughs, &c. that neglect to apprehend rogues, vagrants and idle persons, whores, night-walkers, mothers of bastard children like to be a charge to their parishes, &c. And also all defects of highways and bridges, and the names of those who ought to repair them; scavengers that neglect their duty; and all common nuisances in streets and highways; bakers who sell their bread under weight; brewers selling beer to unlicensed ale-houses or victualling-houses; forestallors of markets, ingrossers and regrators, &c. At every quarter-sessions high constables are to pay to the collectors appointed, and the treasurer of the county, all such money as hath been levied and received by them of the churchwardens of parishes for the relief of the poor in prisons and hospitals, &c. *Dalt.* 28. *Lamb.* 125. *Stat.* 43 *Eliz.* c. 2.

By an old statute, the high constable may determine complaints of clothiers and their spinners, and other labourers, relating to not paying wages in ready money, &c. which is liable to a forfeiture of three times the value of the wages; and he may enter into any place to search for tenters and ropes, &c. for stretching of cloth; and if he finds any, he may seize and deface them, &c. And persons resisting the constable, to forfeit 10*l.* *Stat.* 4 *Ed.* 4. c. 9. 39 *Eliz.* c. 20.

The duty and office of *petty constables*, in their several towns, parishes, &c. is generally much the same as the high constable's in his hundred: these officers are to keep the peace; and as conservators thereof, they may command affrayers to depart, &c. and not ceasing, but making resistance

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sistance may put them in the stocks, till they can carry them before some justice, or to the gaol; and may break into a house to see the peace kept; make fresh pursuit into another county, &c. They may command all persons to assist them, to prevent a breach of the peace; justify beating another, if assaulted; and if they happen to be killed doing their duty, it will be taken to be premeditated murder: they may without any warrant from a justice of peace, take into custody any person whom they see committing a felony, or breach of the peace; tho' if it be out of their sight, as where a person is seized by another, &c. they may not do it without a justice's warrant. And a constable cannot detain a man at his pleasure, but only stay him to bring him before a justice, to be examined and committed, &c. *Dalt. c. 1, 8. Lamb. 126, 141. H. P. C. 135. 8 Leon. 307.*

If any offence be done, for which the constable may arrest without warrant, he may convey the offender to the sheriff or gaoler of the county; and a constable by his original authority, for breach of the peace, and some misdemeanors that are not felony, may imprison a man. But 'tis safest and best, to bring offenders to a justice, who, as the cause shall require, will either bail or commit them to prison. Constables may not lawfully take up night-walkers, on bare suspicion only of their being of ill fame; if they are not found breaking the peace, or doing some unlawful act, &c. And in *London* they ought to be cautious, what persons they send to the compter, taken up at night, for fear of actions for false imprisonment. *2 Hale's Hist. Pl. C. 88, 89, 90.*

One

One part of the office of constables is attendance upon judges of assize, justices of peace at their general and special sessions, and other meetings, to execute warrants, and present offences upon oath; and they must attend at courts-leet, and on coroners, for executing warrants, &c. Petty constables are to execute the warrants of justices, and not dispute it where the justice hath jurisdiction, and the warrant is lawful: and being sworn officers, they need not shew their warrants when they come to arrest any one. But if the justice's warrant doth not set forth the special matter therein, it is unlawful; and if a justice of peace sends a warrant to a constable to take up one for slander, &c. the justice having no jurisdiction in such cases the constable ought not to execute it; if he does, he is liable to action of false imprisonment. *10 Rep. 76. 2 Inst. 291. 2 Danv. Abr. 148.*

As the constable is the proper officer to a justice of peace, and bound to execute his lawful warrant; if a warrant be directed to any constable by name, commanding him to execute the same, though he is not compellable to go out of his own parish, yet he may if he will, and execute it in any place in the county; and shall be justified by the warrant for his so doing; but if the warrant is directed to all constables, &c. generally, no constable can make execution of it out of his precinct. *Salk. 178.*

By warrant from a justice, a constable shall sell the goods of an offender apprehended to discharge the expence of carrying him to gaol: if he hath no goods, then the town, where he was taken, must be at the expence, and the constable, with three or four of the principal inhabitants, may impose a tax on every inhabitant, &c.

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&c. which being allowed by a justice of peace, the constable by his warrant may levy it: and if the inhabitants refuse to make a *rate*, two justices may by their warrant compel them to it. *Stat. 3 Jac. c. 10.*

Constables, headboroughs, *&c.* having laid out money in their offices, they and the inhabitants may tax all persons chargeable by the *43 Eliz. c. 2.* concerning the poor, as every occupier of land, *&c.* which rate being confirmed by two justices, the constables may levy it by distress and sale of goods, *&c.* Constables sued may plead the general issue, and give the special matter in evidence, for any thing done in their office. And if a constable doth not his duty, he may be indicted and fined by the justice of peace. *21 Jac. c. 12. 13 & 14 Car. 2. c. 12. 24 Geo. 2. c. 44.*

And the duty of constables under particular heads, extends to affrays, alehouses, arms, arrests, artificers, bakers, bastardy, bawdy-houses, bridges, butter, buttons, carriages, cattle, clothiers, coals, conventicles, customs, deer-stealing, deserters, distillers, distress, drunkenness, dyers, escapes, excise, felons, fish, forcible entry, forestallers, game, gaming, gaol and gaolers, gunpowder, hawkers, hay-market, hedge-breakers, highways, horses, hue and cry, inns, juries, labourers, land-tax, maltsters, measures, militia, night-walkers, orchards robbed, physicians, plague, popish recusants, post-letters, presentments, prisons, prisoners, riots, rogues, robbery, sabbath, servants, shoemakers, soldiers, swearing, taylor, tithes, tobacco, vagrants, watch, warrants, weights, wreck, *&c.*

Under all which heads above, the constable's business is chiefly in serving warrants, making com-

commitments, and levying penalties, &c. by order of justices.

There is a long form of a constable's oath in *Dalton*, which is adopted by *Mr. Barlow*, expressing his duty in many instances; but as that form nevertheless doth not contain the hundredth part of the constable's duty, nor indeed the most material instances thereof, it may be more eligible (as no particular form is directed by any statute) to swear him to the due execution of his office in general, than to descend to those particulars; lest by mentioning some parts of his duty, and not others, he may be induced to think, that those others are not so necessary. *Burn's Just. qto. 256. pl. 11.*

Of publick Offences committed against the King and the People, and their Punishment.

AN offence is a crime or fault laid to a man's charge, which may affect the life, fortune or possessions of another; or it is an act committed against a law, and punishable by it: and offences are various and many; but the most common and publick ones are these,

- | | | |
|-------------------|-----------|------------------|
| 1. High treason. | } Crimes. | 6. Robbery. |
| 2. Petit treason. | | 7. Rape. |
| 3. Murder. | | 8. Sodomy. |
| 4. Felony. | | 9. Forgery. |
| 5. Burglary. | | 10. Perjury, &c. |

Treason

Treason is defined to be an offence committed against the security of the king and kingdom: at common law there were different opinions concerning high treason, and before the statute 25 *Ed. 3.* it was a very uncertain crime; for the killing of the king's brother, or even his messenger, was taken to be included in it; so when acts tended to diminish the dignity of the crown, and where a man grew popular, this was constructed to be inroaching on royal power, and held to be treason: but since the making that act there can be no constructive treason. *Hawk. Pl. Cr. 34.*

The treasons by the above-mentioned statute I shall divide into,

1. High treason against the king and queen's person, &c. and the crown.
2. Treason in levying war against the king in his realm.
3. By adhering to the king's enemies, within the realm, or aiding them elsewhere.
4. In violating or deflowering the queen, or the king's eldest daughter,
5. By counterfeiting the king's great or privy seal, or his money.

1. Treason by compassing or imagining the death of the king, queen or their eldest son and heir, must be manifested by some overt act; as by providing arms to do it, consulting to levy war against him, writing letters to excite others to join therein, assembling persons in order to (1) imprison or depose the king, or

(1) See *Ed. Princ. Pen. Law. 113.* 4 *Bl. Com. 6, 79.*

to get him into their power, &c. these acts are sufficient to prove that one compassed or imagined the death of the king, and to make a man guilty of high treason. 3 *Inst.* 6, 12.

It was formerly held that compassing by bare words, is not an overt-act to make this crime treason; but it hath been adjudged, that words are an overt-act: such deliberate words as shew a direct purpose against the king's life, will amount to an overt-act of compassing or imagining the king's death; for as the compassing or imagining the death of the king is the treason, words are the most natural way of expressing the imagination of the heart, and may be good evidence of it: and any external act, which may be a manifestation of such imagination, is an overt-act. But if words are set down in writing, and kept privately in a man's closet, they are no overt-act of treason, except the words are published. *Cro. Car.* 242. *Hawk. P. C.* 40, 41. *Kel.* 20.

Words of persuasion to kill the king are overt-acts of compassing his death; and it is held, that he who intendeth by force to prescribe laws to the king, and to restrain him of his power, doth intend to deprive him of his crown and life; that if a man be ignorant of the intention of those who take up arms against the king, if he joins in any action with them, he is guilty of treason: and that the law judges every rebellion to be a plot against the king's life, and a deposing him; because a rebel would not suffer that king to reign and live, who will punish him for rebellion. *Moor* 620.

Under the head of compassing and imagining the king's death, intention of treason proved by circumstances is punished as high treason; and

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mens actions are governed by their intentions, &c. 5 *Mod.* 206.

Letters of intelligence written and sent, in order to be delivered to the enemy, are, though intercepted, overt-acts of compassing and imagining the king's death. *Burr. Rep.* 646, 647, 650.

Levying war is an overt-act of compassing the king's death. *Burr. Rep.* 646. *Fost. Cr. Law.* 197, 213.

Overt-acts of the intention of levying war, are overt acts of such compassing. *Burr. Rep.* 646.

Soliciting a foreign prince, even in amity with this crown, to invade the realm, is such an overt-act. *Burr. Rep.* 646.

Meeting and consulting how to kill the king, is an overt-act of compassing. *Fost. Cr. Law.* 195.

Or, how to depose or imprison him, or to get his person into the power of the conspirators. *Fost. Cr. Law.* 195, 196.

Inviting foreigners to invade the kingdom, is an overt-act of compassing. *Fost. Cr. Law.* 196.

Going into a foreign country for that purpose, is an overt-act. *Fost. Cr. Law.* 196, 197.

Adhering to the king's enemies, is an overt-act of compassing. *Fost. Cr. Law.* 197, 217, 218.

The actual murder of the king, operates in legal evidence, only as an overt-act, to prove the compassing of his death. *Ed. Princ. Pen. Law.* 123.

2. To levy war against the king in his realm is high treason, by the statute of *Ed. III.* and

was so at Common Law. But, as in cases of treason, there must be an overt-act, a conspiracy or compassing to levy war is no overt-act, unless a war is actually levied; though if a war be levied, then the conspirators are all traitors, altho' they are not in arms: and a conspiracy to levy war will be evidence of an overt-act for compassing the king's death; but if the charge in an indictment be for levying war only, it must be proved that a war was levied, to bring the offender under this clause of the statute.
3 Inst. 8, 9. H. P. C. 14.

Persons raising forces for any publick end or purpose, and putting themselves in a posture of war, by chusing leaders, and resisting constables, or the guards, &c. is high treason: and those who make an insurrection in order to redress a publick grievance, whether it be a real or pretended one, are said to levy war against the king, though they have no direct design against his person. Where great numbers by force endeavour to remove certain persons from the king, or to lay violent hands on a privy councillor, or revenge themselves against a magistrate for executing his office; or to deliver men out of prison, or reform religion or the law, to pull down all bawdy-houses, or throw down all inclosures in general, &c. these acts will be high treason: But where a number of men rise to remove a grievance to their private interest; as to pull down a particular inclosure, &c. they are only rioters. *Sid. 358. 5 Inst. 9. Kel. 75. Hawk. Pl. Cr. 37.*

If two or more conspire to levy war and one of them alone raises forces; this shall be adjudged treason in all. And not only such as directly rebel and take up arms against the king,

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but also those who in a violent manner withstand his lawful authority, or attempt a reformation of his government, do levy war against him: and therefore to hold a fort or castle against the king's forces, to keep together armed men in great numbers, against the king's express commands, have been held treason. *Dy. 98. 3 Inst. 10.*

But if where a rebellion is broke out, persons join themselves to rebels, &c. for fear of death, and return the first opportunity, they are not guilty of this offence. *Kel. 76.*

Military weapons not necessary to make an insurrection amount to levying war. *Fost. Cr. Law, 208.*

Assemblies upon private quarrels do not amount to levying war. *Fost. Cr. Law, 208, 209.*

Nor do risings for effectuating purposes of a private nature. *Fost. Cr. Law, 210. &c.*

But insurrections for purposes of a public and general concern, do. *Fost. Cr. Law. 210. &c.*

It is a war levied, though no action ensues. *Fost. Cr. Law, 218.*

Attacking the king's forces is levying war, *Fost. Cr. Law, 219.*

So is holding a fort or castle against the king. *Fost. Cr. Law, 219.*

3. To adhere to the king's enemies within his realm, or give them aid in the realm, or elsewhere, is treason by the statute: here adherence may be proved by giving the king's enemies comfort or relief, or being in counsel with others to levy any seditious wars; and the delivery or surrender of the king's castles or forts, by the captains thereof, to the king's enemy, within the realm or without, for reward,

ward, &c. is an adhering to the king's enemies, and high treason by 25 *Ed.* 3.

It has been adjudged, that adhering to the king's enemies is an adhering against him; and this adhering to the enemies of the king out of the realm will be treason: one who was beyond sea, having solicited a foreign prince to invade the kingdom, was held guilty of high treason, and triable by the Stat. 35 *H.* 8. c. 2. But adherence out of the realm must be alledged in some place in *England*. 3 *Inst.* 10. *H. P. C.* 14. *Dyer* 298.

Subjects of the king, in open war, or rebellion, are not the king's enemies, but traitors; and if a subject join with a foreign enemy, and come into *England* with him; if he be taken prisoner, he shall not be ransomed, or proceeded against as an enemy, but as a traitor to the king: but an enemy coming in open hostility into this kingdom and taken, shall be either executed by martial law, or ransomed, for he cannot be indicted of treason, because he never was within the allegiance of the king. 3 *Inst.* 11.

Letters of intelligence, written and sent in order to be delivered to the enemy, are, though intercepted, overt-acts of adhering to the king's enemies. *Burr. Rep.* 650.

Furnishing the enemy with money, &c. or sending money, intelligence, &c. though the money or intelligence be intercepted, will amount to adhering. *Fost. Cr. Law*, 217, 218.

Cruizing on the king's subjects, under a commission from a power at war with us, is adhering. *Fost. Cr. Law*, 218.

Of publick Offences.

When one knows that another hath committed treason, and doth not reveal it to the king, or his privy council, or some magistrate, that the offender may be secured, &c. it is high treason by our ancient law: but there must now be an assent to some outward act, to make concealing it treason. 3 *Inst.* 138.

4. To violate and deflower the king's wife, or eldest daughter unmarried, or the wife of the king's eldest son, are treason within the statute of king *Edw.* III. Also violating the queen's person, &c. was high treason at common law, because it destroyed the certainty of the king's issue, and consequently raised contention about the succession. *H. P. C.* 16. 4 *Bl. Com.* 81. *Ed. Princ. Pen. Law.* 124.

Not only violating the queen consort is high treason, but also her yielding and consenting to it is treason in her; but this doth not extend to a queen dowager: so likewise violating the wife of the prince, is treason only during the marriage. And the eldest daughter of the king is such a daughter as is eldest not married at the time of the violation, which will be treason, although there was an elder daughter than her, who died without issue; for now the elder alive has a right to the inheritance of the crown, upon a failure of issue male. 3 *Inst.* 9. *H. H. P. C.* 124. 4 *Bl. Com.* 81. *Ed. Princ. Pen. Law.* 125.

The treason against the queen's life, mentioned in the statute, must be also during the coverture; and it extendeth not to a dowager queen. 3 *Inst.* 9.

The wife of the second son, is not within the statute, tho' her issue is inheritable, in preference to the eldest daughter, neither doth it seem

seem treason to violate the eldest daughter, that hath been married, *Bl. Com.* 200. the Common Law extended the same sanction to all the daughters. *Ed. Princ. Pen. Law,* 125.

5. To counterfeit the king's great seal, privy seal or his money; or bring false money into this kingdom, counterfeited like the money of *England*, to make payment therewith in deceit of the king and his people, these are high treason by the statute of *Ed.* 3.

As to counterfeiting the king's seal, it was treason by the Common Law; and the statute 25 *Ed.* 3. mentions only the great seal and privy seal; for the counterfeiting of the sign manual, or privy signet, is not treason within that act; but by 1 & 2 *P. & M. c.* 11. Those who aid and consent to the counterfeiting of the great seal, are equally guilty with the actors; but an intent or going about to counterfeit the great seal, if it be not actually done, is not treason; there must be an actual counterfeiting, and it is to be like the king's great seal. 3 *Inst.* 15 *H. P. C.* 18.

And the fixing the great seal to a patent, without warrant, or rasing any thing out of a patent, and adding new matter therein; or taking off the wax impressed by the great seal from one patent, and fixing it to another, are not within this law: but here, tho' this be not a counterfeiting, it has been adjudged a misprision of treason of the highest degree. 3 *Inst.* 16. *Kel.* 80.

At Common Law, *Forging of the king's money* was treason; as counterfeiting it is by the Stat. 25 *Ed.* 3. And forging or counterfeiting foreign money made current here by procla-

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mation, is likewise high treason by 1 *Mar. sess.* 2. c. 6. And as those persons that coin money without the king's authority, are guilty of treason; so are those who have authority to do it, if they make it of greater alloy, or less weight, than they ought. In case of bringing counterfeit money into this kingdom, it must be actually counterfeited, according to the likeness of *English* money, and is to be knowingly brought over from some foreign nation, not from any place subject to the crown of *England*, and must be uttered in payment. 3 *Inst.* 17. *H. P. C.* 20.

All *Trials* for high treason shall be according to the course of the Common Law, and not otherwise: but treasons committed out of the realm, may be tried in *B. R.* as if the offence had been done in the county of *Middlesex*; also they may be inquired of and tried in such county as the king thinks fit, &c. Persons indicted for treason are to have copy of the indictment five days before trial, to advise with counsel; and shall be admitted to make a full defence, by counsel, witnesses, &c. and there must be two lawful witnesses to the same overt-act, or two acts of the same treason, produced face to face, to make out the same treason against them. *Stat.* 35 *H.* 8. c. 2. 1 & 2 *P.* & *M.* c. 10. 7 *W.* 3. c. 3. See *Fest. Cr. Law*, 221. touching this act, and *Stat.* 20 *Geo.* 2. c. 30. *Stat.* 25 *Edw.* 3. st. 5. chap. 2. 26 *Hen.* 8. chap. 13. *sess.* 5. 1 *Mary*, st. 2. chap. 6. 1 & 2 *P.* & *M.* chap. 2. 5 *Eliz.* chap. 2. 18 *Eliz.* chap. 1. 8 & 9 *W.* 3. chap. 26. 1 *Ann.* st. 2. chap. 17. 6 *Ann.* chap. 7. 7 *Ann.* chap. 21. *sess.* 10. 15 & 16 *Geo.* 2. chap. 28. 17 *Geo.* 2. chap. 39. in felonies by statute, *post. p.*

Party

Party indicted for treason intituled to copy of indictment, and lists of witnesses for the crown, and of the jurymen, who are to be returned, on panel, ten days before arraignment. *Dougl. Rep. 590.*

High treason to attempt by intimidation and violence to compel repeal of a law. *Dougl. Rep. 590.*

Lord George Gordon was proceeded against by a trial at the bar of the court of King's Bench. *Dougl. Rep. 590.*

Papers found in the custody of the person himself, may be read against him, if proved by the evidence of those who have seen him write, or know his hand. *Burr. Rep. 644.*

When prisoners give no evidence, the counsel for the crown may decline summing up their own. *Burr. Rep. 645.*

Some one overt-act must be proved in the county, where the indictment is laid. *Burr. Rep. 647.*

A letter dated from the place, which lies in that county, is sufficient for such proof. *Burr. Rep. 647.*

One attainted of treason, may be charged with a civil suit. *Wils. Rep. 217. Bl. Rep. 31. Fost. Rep. 61.*

One convicted of treason is brought to the bar of the court of King's Bench, and pleads he is not the same person, issue is joined *instante*, the prisoner is tried, found guilty, and executed. *Wils. Rep. 150. Bl. Rep. 3. Fost. Rep. 40.*

Judgment for treasonable words. *Bl. Rep. 37.*

Private persons may rise to quell a treasonable riot. *Bl. Rep. 47.*

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Petit Treason is where one out of malice takes away the life of a subject to whom he owes special obedience; and is called *petit treason*, in respect to high treason, which is against the king: it may be committed where a servant kills his master, a wife her husband, or a secular or religious person killeth his prelate or superior. And aiders, abettors and procurers are within the act: but if the killing is upon a sudden falling out, or *se defendendo*, &c. it is not *petit treason*. 25 *Ed. 3. st. 5. c. 2.* 3 *Inst.* 20. *H. P. C.* 24.

This is a crime committed against the head, tho' not against the supreme head; and if a servant kills his mistress, or the wife of his master, she is master within the letter of the statute, and it will be *petit treason*. A servant intending to kill his master, laid in wait for that purpose while he was his servant, but did not do it 'til he had been a year out of his service; it was adjudged *petit treason*: and if a servant procure another person to kill his master, and he kills him in the servant's presence; this is *petit treason* in the servant, and murder in the other; but if the servant be absent, he will be only accessory to the murder. 3 *Inst.* 20. *Moor* 91. *H. P. C.* 23.

If a wife and a stranger kill the husband, it is *petit treason* in the wife, and murder in the stranger: and where a wife and her servant conspire to kill the husband, and the servant alone in the wife's absence killeth him, it shall be *petit treason* in both. If the wife procure a servant to kill her husband, both are guilty of *petit treason*; and if a stranger procures a wife or servant to kill the husband or master, he may be indicted as accessory to *petit treason*. *Dalt.* 337. *Crompt.* 41. *Dyer* 128, 332.

A maid servant and a stranger conspired to rob the mistress, and in the night the servant opened the door, and let in the stranger into the house, who killed her mistress, she lighting him to her bed, but neither saying nor doing any thing, only holding the candle; and this was held murder in the stranger, and petit treason in the servant. *Dyer* 128.

By our law petit treason implies murder, and is the highest degree thereof: and it is said that in petit treason two witnesses are required to the indictment; but not to the trial of it, for it is not within the statute 7 *W. 3. c. 3. 2 Hawk. Pl. Cr.* 258.

Petit treason is within stat. 25 *Geo. 2. c. 37.* for preventing murder. *Fost. Cr. Law.* 107.

An appeal of death will lie in case of petit treason. *Fost. Cr. Law,* 323.

Pardon of murder, pardons petit treason. *Fost. Cr. Law,* 324.

Person guilty of petit treason, may be indicted of murder. *Fost. Cr. Law* 325.

Person indicted of petit treason, may be found guilty of murder. *Fost. Cr. Law,* 328.

Wife or servant joining with a stranger, in murder, may be put in same indictment. *Fost. Cr. Law.* 329.

Petit treason ousted of clergy, as murder. *Fost. Cr. Law,* 107, 329, 330.

Petit treason and murder, same offence, differing only in degree. *Fost. Cr. Law,* 336.

Petty treason, in our laws differs widely from other instances of murder, in certain privileges allowed defendant; such as, the power of a peremptory challenge of thirty-five jurors, and the requisition of two witnesses to the indictment and on trial. *Ed. Princ. Pen. Law.* 242. but see *Fost. Cr. Law.* 328. *contra.*

Murder

Of publick Offences.

Murder is a wilful and felonious killing of a man upon malice forethought, so as the party wounded or hurt die within a year and a day; and if one dies in that time, through disorderly living, it shall be no excuse, the wounds will be judged the principal cause of his death.
3 Inst. 53. H. P. C. 55.

There are many ways of committing this crime of murder; as by weapon, poison, crushing, bruising, smothering, strangling, starving, &c. which I shall here treat of under,

1. Murder done out of malice prepensed.
2. Manslaughter or killing without malice.
3. Homicide or killing justifiable and excusable.

1. In murder 'tis malice makes the crime; which is either express, where it may be evidently proved there was former ill-will, and the killing is with a sedate mind, and formed design of doing it; or it is implied by law, when one kills another suddenly, having nothing to defend himself, as going over a stile, and the like. He who doth a cruel and voluntary act, whereby death ensues, doth it of malice prepensed and forethought, in the esteem of the law: and if a person in cool blood maliciously and deliberately beats another in such a manner, beyond any apparent intent of chastisement, that he dieth; it is murder by express malice. So where a man executes his revenge, on a sudden provocation, in such a cruel manner, with a dangerous weapon, as shews a malicious intention to do mischief, and death follows, 'tis malice express from the nature of the fact.
3 Inst. 51. H. P. C. 47, 49. Kel. 64, 127

If

If one lays poison to kill a certain person, and another takes it, and dies; or if having malice to a man, strikes or shoots at him, but misseth him and kills another person; these are murder: and by poisoning, and where one killeth another without provocation, malice is implied. If one resolves to kill the next man he meets, and does kill him, it is murder, though he knew him not; here malice is implied against mankind. Where two persons meet and fight on a precedent quarrel, and one is killed; or if a person upon a sudden quarrel appears to be master of his temper, and kills another, it will be murder: for when persons fight after a former quarrel, it shall be presumed to be out of malice; and if two men fall out in the morning and meet and fight in the afternoon, if one of them be killed, this is murder; their after-meeting is of malice. If two persons fight a *duel*, upon some quarrel precedent; and one of them be killed, both principal and seconds are guilty of murder. 3 *Inst.* 51, 52. *Kel.* 27. *Plowd.* 578. *H. P. C.* 51. *Hawk. Pl. Cr.* 81.

A man being provoked by words or gestures, makes a push at a person before his sword is drawn, and thereupon a fight ensues, wherein he who made the assault kills the other, this will be murder; but if he had made no push 'till the other's sword was drawn, it would have been only manslaughter in the person killing. And if one upon a quarrel with another tell him that he will not strike first, but will give such other a pot of ale to strike him, and thereupon the other strikes him, and he kills the other, he is guilty of murder; this being only a cover to his malicious intention. *Kel.* 55, 61. *H. P. C.* 48.

Where

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Where a person assaults another with malice, although he be afterwards driven by the other to the wall, and kill him there in his own defence, it is murder in respect of his first intent: but if the party assaulted fly to the wall, and being still pursued kills the other, it is only manslaughter in his own defence. If two having malice fight, and the servant of one of them, not knowing of the malice, killeth the other, this is murder in the master, and but manslaughter in the servant; though when there is a conspiracy to kill a man, but no malice against his servant, if the servant be slain, the malice against the master shall be construed to extend to his servant, and killing the servant is murder. *H. P. C.* 47. *Kel.* 58, 129. *Dyer* 128.

If two or more persons come together to do any unlawful act, as to beat a person, rob a park, &c. and one of them kills a man, it is murder in all that are present, aiding and assisting, or that were ready to aid and assist: all will be said to intend the murder, and such persons adjudged to be present that are in the same house, though in another room, or in the same park, though half a mile off: when persons are doing an unlawful act, the law presumes malice; and so it is if death happens, where several persons intend only a breach of the peace, &c. *3 Inst.* 56. *Dalt.* 344. *Kel.* 87, 116, 127.

In case any magistrate or minister of justice is killed in the execution of his office; a sheriff, constable or watchman in doing of their duty, or any other that comes in aid of the king's officer; and if a watchman be killed in staying of night-walkers, it is said to be murder: and here
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a person shall not come off by alledging that what he did was in a sudden affray, &c. Also where a bailiff is killed in executing a lawful warrant, it is murder; but if the bailiff doth that which is unwarrantable, as if he break open a door, or window of a house, &c. to make any arrest in a civil case, and where he hath no authority, it is no murder to kill him; 5 *Inst.* 51. *Kel.* 60, 128. *H. P. C.* 46. *Cro. Jac.* 280. *Cro. Car.* 372. *Hawk. Pl. Cr.* 84, 86.

Killing a person endeavouring to part others fighting, though without any evil intention against him, is murder: and if one who sees a murder committed, doth not his best endeavours to apprehend the murderer; or if where two are fighting and others looking on do not endeavour to part them, if one is killed, the lookers on may be indicted and fined. 3 *Inst.* 53. *Nay.* 50.

On special verdict, principals in second degree cannot be affected unless jury find expressly, that they were actually present, or that some acts were done by them, which shew they were present or of the party, on same pursuit, and under engagement and expectation of mutual defence and support from person who did the fact. *Dougl. Rep.* 207.

If several are indicted, *A.* as giving blow, and others as present, aiding and abetting, evidence that one of the others gave the blow, and that *H.* was only present, &c. will support indictment. *Dougl. Rep.* 207. *n.*

If a stroke be given at sea, and party dies in *Ireland*, where shall the murder be tried? *Bl. Rep.* 459.

What judgment to be given in murder.

2. Man-

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2. Manſlaughter is the unlawful killing a man, without any preſented malice; as when two perſons meet, and upon ſome ſudden falling out, the one kills the other. And this crime is felony, but for the firſt time admits of clergy.

It muſt be on a ſudden quarrel, where the party guilty doth not appear to be maſter of his temper; by talking calmly upon the quarrel, or afterwards in other diſcourſe, whereby the heat of blood may be preſumed to be cooled: therefore if two perſons meet together, and in ſtriving for the wall one of them kill the other, this is man-ſlaughter; ſo it is, if upon a ſudden occaſion they had gone into the fields, and fought, and one had killed the other; for all is one continued act of paſſion, on the firſt ſudden occaſion. *Kel. 56. 3 Inſt. 51, 54. H. P. C. 48.*

In manſlaughter, the killing is to be upon an immediate falling out, or on juſt provocation; and as to provocations, no treſpaſs, breach of a man's word, or affront by words, &c. will be thought a juſt provocation to excuſe the killing of another; though if upon ill words, as calling another, ſon of a whore, &c. both the parties ſuddenly fight, and one of them kill the other, it will be but manſlaughter; being done in a preſent heat. And if one upon angry words aſſault another, by pulling him by the noſe, and he that is aſſaulted draws his ſword, and immediately kills the other party, this is only manſlaughter; for the peace was firſt broken by the party killed, and here an indignity was offered to the ſlayer, from whence he might apprehend that there might be ſome farther deſign againſt him. If a man is taken in adultery with another perſon's wife, and the huſband preſently kills

kills the adulterer; it is a just provocation, and makes it manslaughter. *Kel.* 55. 131, 135. *Hawk. Pl. Cr.* 82. *Ventr.* 158.

If it appears that one hath killed another, it shall be intended that he did it maliciously; unless he can prove the contrary, that he did the fact upon just provocation, *Fost. Cr. Law*, 255. And there is a manslaughter punishable as murder by the statute 1 *Jac. c.* 8. which ordains, that if any person shall stab another, not having then a weapon drawn, or not striking first, so that he dies within six months, although it were not of malice or forethought, it is felony without benefit of clergy: but this doth not extend to persons stabbing others by misfortune, &c. with no intent to commit manslaughter; and the act relates to the party only that actually gave the stroke, or stabbed the other, and not to those who were aiding or abetting. *H. P. C.* 58, 266. *H. H. P. C.* 467. *Hawk. Pl. Cr.* 77. *J. 4.* *Gilb. Evid.* 272. *Al.* 43, 44, 47. 2 *H. H. P. C.* 292. *Law Evid.* 277. *pl.* 39. *Kel.* 33. 35. *Bulstr.* 87. *W. Jones* 220. *Fost. Cr. Law Disc.* 2. *chap.* 6. *p.* 297. 7 *Mod.* 133. 2 *Ld. Raym.* 845.

A blow given, or weapon drawn at any time during the quarrel, before the thrust or stab, is within the words of the statute: and drawing out a pistol, and levelling it at the party killing, or throwing a pot, bottle, &c. are within the equity of the words, *having a weapon drawn*: and the person stabbing must be specially indicted upon the statute, to be ousted of clergy; though even then it is said the jury may find manslaughter generally. 3 *Lev.* 255, 266.

If a man shoots off a gun in a city, or publick highway, which must endanger the life of some

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person,

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person, and one is killed, it is manslaughter by the common law; and if a person throw a stone over a wall in a place where people often resort, or at another in play, and kill any one, if it be done without an evil intention, it is manslaughter; if with an evil intention to hurt, murder. A man shoots at the tame fowl of another, which is an unlawful act, and kills a stander-by, it is murder: if he be shooting at wild fowl, hare, &c. and not qualified to keep a gun or to kill game, 'tis manslaughter; and where he is qualified to keep a gun, it is only chancemedley. 3 *Inst.* 56, 57. *H. H. P. C.* 475, 476.

If officer on impress service fires in the usual manner at the halliards of a boat, in order to bring her to, happen to kill, it is only manslaughter. *Cowp. Rep.* 830.

3. There is a *Homicide* or killing justifiable; as if a person attempt to commit murder, robbery, or other felony, a man or any of his servants, may lawfully kill him: and where one in possession of a room in a publick house, kills another who attempts to turn him out of it; the killing the assailant hath been held to be justifiable. Also if a woman kill a man attempting to ravish her, it is justifiable to do it. 2 *Inst.* 316. *H. P. C.* 32. *Kel.* 51. *Hawk. P. C.* 83.

Those who are engaged in a riot, &c. standing in opposition to a justice's command, or lawful warrant, or if trespassers in a forest or park, will not surrender, but defend themselves; if a felon will not suffer himself to be arrested, and refuses to obey an arrest on lawful warrant; or if a felon pursued upon hue and cry, flies for it; where a prisoner assaults those that conduct him to gaol, or his gaoler in endeavouring to escape; or a person arrested resists the sheriff, &c. the killing

killing these is justifiable: but this is understood when an offender on an arrest cannot be taken without killing, &c. 3 *Inst.* 56, 221. *H. P. C.* 57. *Kel.* 28.

The *Homicide*, or killing excusable, is where a man kills another merely in his own defence; and this must be upon an unavoidable necessity, when it is called *Je defendendo*. Here malice is not to be coloured under pretence of necessity, if it be, it is murder. 3 *Inst.* 220. *Bac. Max.* 25.

Trials for murder are to be in the county where the fact was committed, by the Common Law: though on an indictment being found against a person in the proper county; by special commission it may be heard and determined in any other county. And offenders for murder, and accessaries being indicted, may be arraigned at any time within the year, at the king's suit; and if the principal or accessory be acquit, yet the justices shall not suffer them to go at large, but either remand them to prison, or let them be bailed, until a year and a day be out, allowed for an appeal. *Cro. Car.* 247. 3 *Inst.* 27. 3 *H.* 7. c. 1.

And an *Appeal* of murder is always at the suit of the subject, brought by a party interested in the person killed; and may be had by the heir male for the death of his ancestor, or by a wife for the death of her husband, &c. *Co. Lit.* 287. 2 *Inst.* 318.

Felony is a crime committed with a fell, fierce or bitter mind; and was anciently every capital offence, perpetrated with an evil intention: for all capital crimes by the Common Law came generally under the title of felony. We now

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account any offence felony, that is in degree next petty treason; and this crime I shall reduce to the heads of,

1. Felony by the Common Law.
2. Larceny and felony in stealing goods.
3. Felonies by statutes.

1. Felony by the Common Law, is against the life of a man; as murder, manslaughter, *Felo de se, Se defendendo, &c.* Against a man's goods, such as larceny and robbery; against his habitation, as burglary, arson or house-burning; and against publick justice, as breach of prison. Piracy, robbery or murder upon the sea, are felonies punishable by the Civil Law; and likewise by statute: and felonies are said to be of a public or private nature; hurtful to the people in general, or to some particular persons. *Co. Lit.* 391. 3 *Inst.* 15.

Where persons are to undergo judgment of life and member for any crime is felony, whether the word *Felony* be mentioned or not. And of felonies in general, there are two sorts; one which for the first offence is allowed clergy, and another that is not; but clergy is granted where it is not expressly taken away by statute. See 23 *Hen. 8. c. 1.* 1 *Edw. 6. c. 12.* and 4 & 5 *P. & M. c. 4.* post.

If a person to whom goods are delivered, on a pretended buying them, runs away with them, it is felony; and a guest stealing plate set before him at an inn, &c. 'tis felony; also persons who have the charge of things, may be guilty of felony: and the least removing of a thing, in common attempts of felony, is felony, 'tho' it be not carried off. But things must not be of a base

base nature, or *fera natura*, as dogs, deer, hares, &c. tho' if these last are made tame, 'tis felony to steal them; and so it is of turkeys geese, poultry, fish in a trunk or pond, &c. if they are taken away. 3 *Inst.* 308, 309, 310. 4. *Raym.* 275.

A married woman cannot be guilty of felony in stealing the goods of her husband; but if she deliver them to an adulterer, and he receives them it is felony in him: and if a feme covert commits felony against any one in company with her husband, it shall be presumed to be done by his command, and she shall be excused; though 'tis otherwise where the wife steals goods alone. 3 *Inst.* 310.

2. Larceny is a private felony, against the goods of a man, in his absence; and in respect of the thing stolen, is either great or small: grand larceny is a felonious taking and carrying away the personal goods of another, above the value of 12*d.* not from the person, or by night, in the house of the owner; and petit larceny is when the goods stolen do not exceed the value of 12*d.* *H. P. C.* 69.

The difference between grand and petit larceny is only the value of the goods: and if two persons steal goods to the value of 13*d.* it is grand larceny in both; and in case one at different times steals divers parcels of goods from the same person, which together exceed the value of 12*d.* they may be put together in one indictment, and the offender found guilty of grand larceny; tho' this is very seldom done: but on the contrary, the jury sometimes, where it is an offender's first offence, &c. find it specially, as they may, that the goods are but 10*d.* value; so as to be only petit larceny,

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though the offender be indicted for stealing things of the value of 30 or 40 s. 3 *Inst.* 109. *H. P. C.* 70. *Hell. Rep.* 66.

To make the crime of larceny, there must be a felonious taking, or an intent of stealing the thing, when it comes first to the hands of the offender, at the very time of the receiving. If a man hath possession of goods once lawfully, though he afterwards carry them away with an ill intention, it is no larceny: where a taylor imbezils cloth delivered to him, to make a suit of clothes, &c. it is no felony; nor is it where a servant goes away with his master's goods delivered to him, which is only a breach of trust, by reason of the delivery; (but by statute they are to be under 40 s. value :) and if I lend a man a horse to go to a certain place, and he goes there, and then rides away with the horse, it is not larceny. 3 *Inst.* 107. *Dalt.* 367, 369. 5 *Rep.* 13. *H. P. C.* 61.

As in these cases, there is a lawful possession by the delivery of the goods, that extenuates the offence; but if one intending to steal goods, gets possession of them by ejectment, replevin, or other process at law unduly obtained, by false oath, &c. it is a felonious taking. And a man may commit larceny by taking away his own goods, in the hands of another; where the owner delivers goods to a carrier, and afterwards secretly steals them from him, with an intent to charge him for them, &c. because the carrier had a special property for a time. 3 *Inst.* 108, 64, 110. *Kel.* 43, 44. *Dalt.* 373.

All felony includes in it trespass, so that if the party offending be guilty of no trespass in taking the goods, he cannot be guilty of felony or larceny in carrying them away. *Hawk. P. C.* 89.

If

If after goods are sold, and earnest given, or the whole sum agreed for them paid, seller takes out part, tho' before actual delivery to the buyer, or to any person to convey to him, this is grand or petty larceny, according to the value taken out, tho' the goods may be remaining in the warehouse of the seller. *Lofft's Rep.* 601, 602.

In felony there are *accessaries* before or after the fact; before, where one advises, abets or procures the felony, but is absent when done; after, when a man receives, relieves, assists, &c. knowingly, any one that hath committed felony: and persons furnishing others with weapons; finding a felon a horse, for his journey; or relieving him with money, victuals, &c. will make them accessory. *Co. Lit.* 57. *H. P. C.* 218, 219.

Private persons may arrest felons; and every person is bound to assist an officer to take them: but one ought not to be taken up upon suspicion of felony, except there be probable cause shewed for the ground of it. If a man be committed to prison for one felony, the justices of gaol-delivery may try him for another for which he was not committed: and a felon refusing to plead, and put himself upon his trial, shall be put to the penance of *peine fort & dure*, and be pressed to death; but if he stands mute by the act of God, it shall be inquired of, &c. *2 Hawk. Pl. Cr.* 75. *Lil. Abr.* 602, 603. *Stat. Westm.* 1. c. 12. *2 Inst.* 178.

Burglary is where a man in the night-time breaketh and entereth into the house of another to the intent to commit felony, whether the intention be executed or not. In its natural

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signification, it is nothing but the robbing of a house; but our law restrains it to robbing houses by night, or breaking in with an intent to rob, or do some other felony: and the like offence committed by day is called house-breaking, to distinguish it from burglary.

4 *Rep.* 493.

It is an offence excluded the benefit of clergy; but the house must be a mansion-house, and the out-buildings, as barns, stables, &c. adjoining to it, 'tis burglary to break; tho' not a barn, &c. at a distance: where part of a house is divided from the rest, with a door of its own to the street, it is mansion; but a chamber, wherein any person lodges as an inmate is not, in which if burglary be committed, it must be laid in the mansion-house of him that let it. A chamber in an inn of court is mansion; because every one there hath several property. 4 *Rep.* 40. *H. P. C.* 82. *Kel.* 84. 3 *Inst.* 65. *Fost. Cr. Law* 76, 77.

There may be a burglary committed in a mansion-house, though all the family are absent: and if a man hath two houses, and lives sometimes in one, and sometimes in the other; and the house he doth not inhabit is broken in the night, it is burglary. If a servant draws the latch of his master's chamber, to rob, &c. 'tis a breaking; and if he open a window for a thief to come in, it is burglary in the stranger, and robbery in the servant: if a person do not break a house, as if he be within and steal the goods, and then open the house on the inside, and go out with the goods, this is burglary: so where one comes down a chimney to rob a house, &c. *Popb.* 52. 3 *Inst.* 64. *Kel.* 682. *H. P. C.* 83. *Fost. Cr. Law* 108, 109. *Stra.*

Stra. 481. *H. H. P. C.* 562. *Kel.* 30, 67. *Hut.* 20, 33. 2 *Stra.* 881. See *H. H. P. C.* 553.

If thieves pretend business to get into a house by night, &c. and thereupon the owner opens his door, and they enter and rob the house, this will be burglary. Where a thief breaks the glass of windows; makes a hole in the wall; or unlocks any door, &c. to rob, it is a breaking the house: and not only setting a foot over the threshold, but putting a hand, hook or pistol within the window or door, is an entry to make it burglary. Though if a door, &c. be open, or a hole made in the wall before, and the thief enters and steals, or draws out goods; this is not burglary by the Common Law. *H. P. C.* 81, 82. *Kel.* 42, 62. *Fost. Cr. Law* 107, 108.

Robbery is a felonious taking away of money or goods, of any value, from the person of another on the highway, in a violent manner, thereby putting him in fear: and this robbery on the highway is felony of death, though the sum taken is under twelve-pence, or be but one penny. *H. P. C.* 73. *Fost. Cr. Law*, 121.

Where any thief bids the party deliver his money, &c. either with or without weapon drawn, and he gives it him; or a person with sword or pistol in his hand demands my money, and afterwards prays me to give him alms; and I give it accordingly; or if a thief compels one by fear to swear that he will fetch him a sum of money, which he doth, and the thief receives it, these are a taking, to make it robbery. And so when a thief takes the purse of a person, which in a fright he cast into a bush; and where a man endeavouring to escape from a robber

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robber drops his hat, &c. which the highwayman takes up, it is a taking from the person: and in case a thief cuts a man's pocket, whereby his purse falls to the ground, if he takes up the same, though he lets it fall again, it is robbery.

3 Inst. 60. Dalt. 363. H. P. C. 73.

It a robber having taken a person's purse, finding little in it, delivers it back with all the money to the party; 'tis notwithstanding a felonious taking, because he had it in his possession; and the continuance of his possession is not required by law. A person who hath assaulted me, drives my cattle in my presence out of my pasture; or robs my servant of my money or other thing before my face, he may be indicted as having taken such things from my person; for when a servant is robbed, in the sight of his master, of his master's goods, it is adjudged a robbery of the master. Not only the taking away a horse, which a man is actually riding, is robbery; but if the horse be standing by him, and taken against his will, it is in law a taking from the person; and a claim of property, without colour for it, will not excuse it: but if one leaves his horse tied, and steps aside; or if a carrier follows his horses at a distance, and they are taken away, this is not such a taking to be robbery. *3 Inst. 69. S. P. C. 27. Dalt. 364. Pult. 128. Styles 156.*

All that are in company to commit a robbery are principals, and esteemed to take away, tho' one only doth it, in respect to that encouragement which they give one to another; and if one of the gang rides from the rest, and robs another person not intended in the same highway, without their knowledge and consent, out of their view, and returns to them afterwards,

wards, all are guilty of the robbery. He, who apprehends and prosecutes a robber on the highway to conviction, shall receive of the sheriff of the county where the robbery was done 40*l*. (producing the certificate of the judge before whom the offender was convicted) with his horse, furniture, arms, &c. And if any person out of prison, having committed any robbery, discovers two or more robbers, so as they are convicted, he shall be intitled to a pardon. *Crompt. 34. H. P. C. 72. Stat. 1 W. & M. c. 8. s. 7.*

The hundred where a robbery is committed on the highway is chargeable and answerable for it, if done in the day-time of any day, except * *Sunday*; but notice must be immediately given of it to some of the inhabitants of the village near the place, to the intent they may make *bue and cry*, to apprehend the robbers: and if any of the robbers are taken within forty days and convicted, the hundred shall be excused; if not, the party robbed is to make oath before a justice of peace of the county, of the time and place of the robbery, and of what he was robbed, and that he knew none of the robbers; and then in twenty days he may bring his action against the hundred, by original writ, &c. *Stat. 27 Eliz. c. 13. Gro. Car. 37, 41, 211, 379. 3 Salk. 184. 2 Stra. 1247.*

Process is to be served on the high constable of the hundred, &c. and the party robbed in twenty days to give publick notice in the *Gazette*, describing the robber, and circumstances of the robbery; and no hundred shall be charg-

* *Sira. 406. Comp. Rep. 345.*

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ed, if any of the robbers are apprehended in forty days after such notice given; also a reward of 10*l.* shall be paid by the hundred for taking any robber on the highway. 8 *Geo.* 2. c. 16. 2 *Stra.* 1170. not to receive above 200*l.* Stat. 22 *Geo.* 2. c. 24.

Rape is an unlawful and carnal knowledge of a woman, by force and against her will: a ravishment of the body, and violent deflowering her, which is felony by the common and statute law. There must be penetration and emission, to make this crime; otherwise an attempt to ravish a woman, though it be never so outrageous, will be an assault only. *Co. Lit.* 124.

In rapes, it is no excuse or mitigation of the crime, that the woman at last yielded to the violence, and consented either after the fact or before, if such her consent was forced by fear of death, or imprisonment; or that she was a common strumpet, for she is still under the protection of the law, and may be forced: but it is said by some to be evidence of a woman's consent, that she was a common whore. And it is a strong presumption against a woman, that she made no complaint in a reasonable time after the fact; if she conceals it for any long time, it may argue a consent. *Co. Lit.* 123. *H. P. C.* 117. *Hawk. P. C.* 108. 3 *Nelf. Abr.* 45. *H. H. P. C.* 633. 5 *Read. Stat. Law* 49.

It was formerly adjudged not to be rape to force a woman, who conceived at the time; because if she had not consented, she could not conceive: though this opinion hath been since questioned, by reason the previous violence is no way extenuated by such a subsequent consent. And it was a question before 18 *Eliz.*

c. 7. Whether a rape could be committed on a child of the age of six or seven years? By that statute whosoever shall carnally know and abuse any woman child under the age of ten years, he shall suffer as a felon, without benefit of clergy, and here it is not material whether such child consented, or were forced, but it must be proved that the offender entered her body, &c. 2 *Inst.* 190. *Dalt.* 393.

Tho' a woman ravished may prosecute, and be a witness in her own cause; yet a woman's positive oath of a rape, without concurring circumstances, is seldom credited: if a man can prove himself to be in another place, or in other company, at the time she charges him with committing the fact, this will invalidate her oath: so if she is wrong in the description of the place where done, or swear the fact to be committed in such place, to which it was impossible the man could have access at that time; as if the room was then locked up, and the key in the keeping of another person, &c. 3 *Rep.* 37. *Dalt.* 107.

The aiders and abettors in committing a rape may be indicted as principal felons, whether men or women: and there is an *appeal* of rape, which a feme covert may bring without her husband. If a woman ravished afterwards consents to it, her husband, if she have any, or a father, or next of kin, there being no husband, may prosecute this appeal; also the criminal in such case, may be attainted at the suit of the king: and if a woman consent after, she is disabled to challenge any inheritance, dower, &c. 6 *R. 2. c. 6.* 3 *Inst.* 30, 131.

Sodomy, or buggery, is a carnal knowledge of the body of a man or beast, against the order
of

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of nature: and it may be committed by a man with man, which is the common crime; or by man with woman; or a man, or woman, with a beast. 3 *Inst.* 58.

This sin against God, nature and law, it is said, was in ancient time punished with burning; though others say with burying alive: but at this day it is felony excluded clergy; and punished as other felonies. It is felony both in the agent, and patient consenting, unless the person on whom committed be within the age of discretion: and then 'tis felony in the agent only, not him: and he that doth the act is not only a principal, but those that are present aiding and abetting him are principals. 12 *Rep.* 36. *H. P. C.* 117. *H. H. P. C.* 670.

Some kind of penetration and emission must be proved, in acts of Sodomy, but any the least degree is sufficient. See *Fortesc. Rep.* 91.

Forgery by the Common Law is a fraudulent making or altering of a deed or writing, to the prejudice of another man's right, whether it be matter of record, or any other writing, deed or will. 3 *Inst.* 169.

Where one makes a false deed; or if he makes any fraudulent alteration of a true deed, in a material part of it; if he alters a bond, &c. for 500*l.* expressed in figures, to 5000*l.* by adding a new cypher, these are forgery: so it is if a man finding another's name at the bottom of a letter, at a considerable distance from the other writing causes the letter to be cut off, and a general release to be written above the name, &c. And where one being directed to draw up a bill for a sick person, inserts some legacies therein falsely of his own head; or if he omits a bequest

quest to a certain person, which causes a material alteration in the limitation of an estate to another, it will be forgery by the Common Law. *Hawk. Pl. Cr.* 182, 183. *Noy* 118. *Moor.* 760.

A person knowingly falsifies the date of a second conveyance, which he had no power to make in order to deceive a purchaser, &c. he is said to be guilty of forgery: and if a feoffment be made of land, and livery and seisin is not indorsed when the deed is delivered, and afterwards, on selling the land for a valuable consideration to another, livery is indorsed upon the first deed; this hath been adjudged forgery both in the feoffor and feoffee, being done in deceit of an honest purchaser: but there can be no forgery, where none can be prejudiced by the act but the person doing it. *3 Inst.* 170. *Hawk. P. C.* 182. *Moor* 665. *Salk.* 375. *Ld. Raym.* 530.

The forgery of a deed of gift of chattels is not within the words of this statute: and forging an assignment of a lease is not within the act, because it doth not charge the lands, but only transfers an interest, which was in being before. The king may pardon the corporal punishment of this offence; but the plaintiff cannot release it: if he releases the judgment, &c. it shall only discharge the costs and damages; and the judges shall proceed to judgment upon the residue of the pains, and award execution on the same. But in a very extraordinary case, a forgery hath been compounded; and the defendant discharged on paying a fine. *3 Leon.* 170. *5 Rep.* 50. *3 Salk.* 172.

Singular instance of forgery by measuring the writing. *Say. Rep.* 132.

Perjury

Of publick Offences.

Perjury is a crime committed by wilful and false swearing, in any judicial proceedings, in what is material to the issue or cause in question, by a man's own act, or the subornation of others. 3 *Inst.* 194.

To make an offence perjury, it must be wilful and deliberate, and not committed through surprize, inadvertency or mistake of the question; and the deposition is to be direct and absolute, for nothing which the party offers upon his belief is assignable for perjury: it must be false in expresse words or intention; and if one knows not what he swears, it is a false oath in him, so that a person may swear the truth, and yet be perjured. 3 *Inst.* 167, 266. 2 *Roll. Abr.* 77.

Where an oath is taken before a person that hath no authority to give it; or when a court hath not power to hold plea of the cause; there perjury cannot be committed; and if an oath be given by him who hath lawful authority, if it be not in a judicial proceeding, but in a private affair, it is not punishable as perjury. The forswearing must be in something material to the issue; and therefore if what a witness swears be not of any consequence in deciding the cause, it may not be punished as perjury: but if a false oath be given by a man, attended with such circumstances, that the jury are thereby induced in the giving of a verdict, he may be guilty of perjury. 3 *Inst.* 164. 4 *Inst.* 278. *Roll. Abr.* 41, 78.

A person may be indicted at Common Law for a false affidavit taken before a master in chancery; but not on the statute, because this is not perjury in a matter relating to the proof of what is in issue: perjury by the Common Law

Law may be in an immaterial thing, in an answer in chancery; but if one swear false to an interrogatory, in a thing not materially charged therein, it is not perjury. The statute made against perjury extends to no other persons than witnesses; but persons perjuring themselves in their answers in Chancery, or in the Exchequer, or by swearing the peace against another, &c. may be punished for the perjury or subornation thereof at the Common Law; by fine, imprisonment, pillory, &c. *Bulst.* 322. *Sid.* 274. 3 *Inst.* 166.

By the statute persons committing wilful and corrupt perjury, in any cause depending concerning lands or goods, &c. in any of the courts of record, shall forfeit 20*l.* and be imprisoned six months; and their oath shall not be received in any court of record, until the judgment is reversed; and if the offenders have not goods or chattels to pay the forfeiture, they shall be set on the pillory in some market-place, and have both their ears nailed thereto: and for unlawful and corrupt procuring and suborning a witness to give false testimony in any court of record, &c. the offender shall forfeit 40*l.* and if he be not worth that, he shall suffer six months imprisonment, and stand in the pillory in some open market near the place where the offence was committed; and shall not be received as a witness, till such judgment be reversed: but in case the judgment is reversed, the party grieved shall recover damages against the prosecutor, in action on the case, &c. 5 *El. c.* 9. perpetuated by 29 *El. c.* 5. 21 *Jac. c.* 28. *J.* 8.

It has been adjudged, that if a man be convicted of perjury at Common Law, a pardon
H h will

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will restore the party to his testimony ; but not in a conviction on the statute, for there he must reverse the judgment before he can be restored, and disability is part of the judgment. Perjury, or subornation, in proceedings on an indictment, is not within the statute, which mentions only suits by writ, plaint, &c. Though where a witness for the king swears falsely, he may be indicted at the Common Law ; and it is not material whether the oath were at all credited, or the party be any way grieved by it, or not ; as this is not a prosecution grounded on the damage of the party, but on the abuse of publick justice. And if a person procure another to take a false oath amounting to perjury, but he doth not take it, though the person who incited him is not guilty of subornation of perjury, he is punishable by fine. 2 *Salk.* 513. 3 *Inst.* 164. 3 *Leon.* 230.

Every statute that introduces a capital punishment, must be construed strictly, 1 *Will. Rep.* 164. 4 *New. Abr.* 567. *Bl. Rep.* 20. *Fost. Rep.* 51.

It is necessary in indictments for perjury, to state legal authority to administer oath. *Dougl. Rep.* 156.

Perjury must not be only false swearing upon oath, and in a court having authority to administer an oath, and in a matter which is material to the cause, but the false swearing must be deliberate, and it is perjury even if a man swears truly, if he believed what he swore, to be false. *Loff's Rep.* 773, &c.

Proof of party's hand-writing to affidavit, and of persons who administered the oath, sufficient, without evidence of identity of swearer's person, or of his actual swearing. 11 *Burr. Rep.* 1189.

All

3. All statutes in *pari materiâ*, are to be construed as one law. *Dougl. Rep.* 30. See *Loffi's Rep.* 371.

Statutes concerning felonies in general, together with such as are intitled to, or exempted from the benefit of clergy, digested chronologically.

Edward the Second.

1 *Edw.* 2. *ft.* 2. Breaking prison felony, only where prisoner in custody for felony.

Edward the Third.

5 *Edw.* 3. *chap.* 2. Writs to take felons, to be directed to all counties.

14 *Edw.* 3. The goods of felons and fugitives, ought to be inventoried and inrolled by the coroner.

25 *Edw.* 3. *ft.* 5. *chap.* 2. Killing the king's chancellor, treasurer, king's justices of either bench, justices in eyre, or of assize; and all other justices assigned to hear and determine, being in their places, doing their office; all the above offences are hereby declared to be high treason. See *Treason*.

25 *Ed.* 3. *ft.* 5. *chap.* 14. The chattels of felons shall be forfeited on return of *non est invent.* the process against them.

31 *Edw.* 3. *ft.* 1. *chap.* 14. One charged in *Exchequer* with the goods of felons, may charge another over.

37 *Edw.* 3. *chap.* 19. Stealing an hawk, within clergy.

Of publick Offences.

Henry the Fifth.

Hen. 5. chap. 1. Coining or bringing galley halfpence, fuskins, or dodkins, within clergy.

Henry the Sixth.

3 Hen. 6. chap. 1. Confederacies of masons to prevent the statute of labourers, within clergy.

8 Hen. 6. chap. 12. Stealing the records of the courts of justice, and accessaries, within clergy.

18 Henry 6. c. 19. s. 2. Soldiers deserting, excluded clergy.

Richard the Third.

1 Rich. 3. c. 3. Neither the goods nor lands of felons, shall be seized before conviction.

Henry the Seventh.

1 Hen. 7. c. 7. Hunting in the night, or in disguise, or rescuing such offenders; within clergy. See *9 Geo. 1. c. 22.*

3 Hen. 7. c. 2. Taking women away, and marrying or defiling them, having lands or goods, and being heirs apparent, excluded clergy. See *Swindon's case in St. Tri. v. 477.* Stat. *29 El. c. 2. s. 2.*

3 Hen. 7. c. 14. Conspiring or imagining to destroy the king, or any of his council within clergy. See *9 An. c. 16.*

7 Hen. 7. c. 1. Soldiers departing without leave, excluded clergy.

12 Hen.

12 Hen. 7. c. 7. Murder excluded clergy.

Henry the Eighth.

6 Hen. 8. c. 6. Justices of *King's Bench*, may remand felons into their proper counties.

21 Hen. 8. c. 7. Perpetuated by Stat. 5 Eliz. c. 12. Servants (1) embezzling goods delivered to them to the value of forty shillings, within clergy.

21 Hen. 8. c. 2. Stolen goods shall be restored, on attainder of felon.

22 Hen. 8. c. 2. How foreign pleas of felons shall be tried.

22 Hen. 8. c. 2. Destroying or cutting dykes in marsh land, within clergy.

23 Hen. 8. c. 1. Perpetuated by stat. 32 Hen. 8. c. 3. murder, sacrilege, burning houses, or barns with corn therein, robbing dwelling houses, shops, warehouses, coach houses, or stables; or in or near the highway, excluded clergy; and so are accessaries before the fact, in petit treason, murder, burglary, robbing dwelling houses, churches, or in or near the highway; house burning, or burning of barns, having corn or grain therein.

24 Hen. 8. c. 5. No forfeiture for killing a man, attempting to commit murder or robbery.

25 Hen. 8. c. 3. Perpetuated by stat. 32 Hen. 8. c. 3. Robbing dwelling houses, or in or near the highway, or shops or warehouses, coach-houses, or stables, challenging above 20 jurors, on trial for capital offences; murder, sacrilege, burning houses or barns witho

(1) Apprentices under 18 years of age, excepted, by Sect. 2. of the act.

or standing mute, or not answering directly, excluded clergy.

25 Hen. 8. c. 6. Perpetuated by stat. 32 Hen. 8. c. 3. the crime against nature, or sodomy, excluded clergy.

28 Hen. 8. c. 1. Murder excluded clergy.

31 Hen. 8. c. 2. Fishing in another man's pond, with intent to steal, within clergy. See 9 Geo. 1. c. 22.

33 Hen. 8. c. 12. f. 27. Entering into the king's palaces with intent to steal, within clergy.

34 & 35 Hen. 8. c. 14. Clerk of assize, &c. shall certify names of felons, &c. convict, into B. R.

37 Hen. 8. c. 8. f. 4. Horse stealing excluded clergy.

2 & 3 Edw. 6. c. 2. f. 6. Same offence excluded clergy, as by stat. 7 Hen. 7. c. 1. which see.

2 & 3 Edw. 6. c. 29. Sodomy excluded clergy.

2 & 3 Edw. 6. c. 33. Horse-stealing excluded clergy.

5 & 6 Edw. 6. c. 9. Robbing booths or tents in fairs or markets, or churches; accessories before the fact to all crimes specified in stat. 23 Hen. 3. c. 1. (which See) excluded clergy.

Sacrilege, robbery in dwelling-house, shops, warehouses, coach-houses, or stables, excluded clergy: and accessories before the fact to all crimes, specified in stat. 23 Hen. 8. c. 1. excluded clergy.

5 & 6 Edw. 6. c. 10. Robbery in dwelling houses, shops, warehouses, coach-houses or stables, excluded clergy.

1 Edw. 6. c. 12. f. 4. All felonies created since the first year of the reign of king Henry the Eighth, repealed.

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1 *Edw. 6. c. 12. s. 10.* Murder * poisoning, house breaking by day or night, robbery in or near the highway, horse stealing, sacrilege, not answering, or standing mute, without clergy.

1 *Edw. 6. c. 12. s. 11.* How foreign pleas of felony shall be tried.

Mary the First.

1 *Mary stat. chap. 1.* All felonies created since the first year of the reign of king *Henry the Eighth*, repealed.

1 *Mary st. 1. c. 5.* All felonies and offences of præmunire since the first year of the reign of king *Henry the Eighth*, repealed.

1 *Mary st. 2. c. 6.* Counterfeiting signet or sign manual, or foreign gold or silver coin current here, treason.

Philip and Mary.

1 & 2 *P. & M. c. 4. s. 3.* *Egyptians* remaining in the realm one month, excluded clergy.

1 & 2 *P. & M. c. 11.* Importing false and counterfeited foreign gold or silver coin, knowingly, with intent to utter same in payment, treason.

2 & 3 *P. & M. c. 19.* Cutting dykes in marsh land, within clergy.

* Poisoning had been punished by boiling to death, by stat. 22 Hen. 8. c. 9. but the legislature perceiving their error, in attempting to correct depravity in the hearts of individuals, by admitting indecency and cruelty into it's own acts, repealed this by stat. 1 *Edw. 6. c. 12.* and then, under particular reasons of legal nicety, it was thought safest to provide against poisoning, as a capital offence, by a distinct statute, viz. by Sect. 10. and 13, of this law.

Of publick Offences:

4 & 5 P. & M. c. 4. f. 1. Accessaries before the fact, in petty treason, murder, robbing dwelling houses, in or near highway, or in burning dwelling house, or barn having corn or grain therein, or being outlawed, standing mute, or challenging above twenty *jurors*, or not answering, excluded clergy.

Elizabeth.

5 *Eliz.* c. 5. f. 27. Desertion of seamen, within clergy.

5 *Eliz.* c. 11. Clipping, washing, rounding, filing, impairing, diminishing, falsifying scaling, or lightening any money of the realm, or foreign money here current, for lucre, treason.

5 *Eliz.* c. 20. f. 3. Associating with *Egyptians* one month, excluded clergy.

8 *Eliz.* c. 3. f. 2. Second offence of exporting sheep alive, without clergy.

8 *Eliz.* c. 4. Conviction for privately and secretly stealing from the person, above the value of twelve pence, excluded clergy, or outlawry for the same.

18 *Eliz.* c. 1. The like treason as by stat. 5 *Eliz.* c. 11. which see.

18 *Eliz.* c. 7. Conviction of burglary, or breaking into a dwelling house in the night time, excluded clergy, or outlawry for the same.

18 *Eliz.* c. 7. f. 4. Rape and abuse of, by carnal knowledge, a female child under ten years of age, excluded clergy.

27 *Eliz.* c. 2. f. 4. Receiving, relieving, or maintaining popish priests or jesuits, knowingly, excluded clergy.

31 *Eliz.*

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31 *Eliz. c. 4.* Persons indicted of felony in embezzling stores or armour, may make defence by witnesses; embezzlement thereof to twenty shillings value, within clergy.

39 *Eliz. c. 15.* Robbery in dwelling houses, shops, warehouses, coach-houses and stables, excluded clergy.

35 *Eliz. c. 1. f. 3.* Popish recusant refusing to abjure, not departing the realm within the time limited; or returning without the king's leave, excluded clergy.

35 *Eliz. c. 2. f. 10.* Same offences excluded clergy, as by the last statute.

39 *Eliz. c. 2. f. 2.* Stealing, marrying, or defiling women, having lands or goods, or being heirs apparent; and accessaries before the fact, excluded clergy.

39 *Eliz. c. 17. f. 2.* Mariners or soldiers wandering without testimonial of justices, forging such testimonials, and accessaries before the fact, excluded clergy.

31 *Eliz. c. 12. sect. 5.* Accessaries before and after the fact in horse stealing, excluded clergy.

39 *Eliz. c. 17. f. 4.* Soldiers or mariners departing within the year, from the service of those who took them, to save them from execution, excluding clergy.

43 *Eliz. c. 13. f. 2.* Forcibly carrying subjects out of *Cumberland, Northumberland Westmorland and Durham*; or taking or giving black mail, or burning houses or barns with corn therein, excluded clergy.

James the First.

1 *Jac. 1. c. 11.* Polygamy, within clergy.

1 *Jac.*

Of publick Offences.

1 *Jac. 1. c. 31. f. 7.* Persons infected with plague, going abroad, within clergy.

3 *Jac. 1. c. 4. f. 18.* Serving foreign state, without taking oath of allegiance, within clergy.

21 *Jac. 1. c. 26.* Acknowledging fines, recoveries, deeds inrolled, statutes, recognizances, bail, or judgments in the name of another, and accessaries before the fact, excluded clergy.

21 *Jac. 1. c. 27. f. 2.* Mother concealing the death of her bastard child, excluded clergy.

Charles the Second.

22 & 23 *Car. 2. c. 1.* Maiming and maliciously lying in wait, to maim, and all accessaries before the fact, excluded clergy.

22 & 23 *Car. 2. c. 5. f. 3.* Embezzling to the value of twenty shillings, or offending against stat. 31 *Eliz. c. 4.* concerning embezzlement; conviction of stealing cloth from rack or tenters, excluded clergy, or outlawry for the same.

22 & 23 *Car. 2. c. 7. f. 2.* Burning stacks of corn, houses, &c. in the night time, within clergy. Killing cattle in the night, without clergy. See 9 *Geo. 1. c. 22.*

22 & 23 *Car. 2. c. 11. f. 9.* Mariners hindering commanders from fighting, within clergy.

22 & 23 *Car. 2. c. 11. f. 12.* Officers, &c. destroying ships, and accessaries before, excluded clergy.

William and Mary.

3 & 4 *W. & M. c. 9.* perpetuated by stat.
6 & 7 *W. 3. c. 14.* Burglary, robbery in dwell-

dwelling houses, shops, warehouses, coach-houses, or stables, and accessaries before the fact; women, after conviction of offence within clergy, on conviction of any other felony; or challenging above twenty *jurors*, on trial for capital offence; standing mute, or not answering directly, or being outlawed, excluded clergy.

3 & 4 *W. & M. c. 9. s. 5.* Stealing furniture from lodgings, if above twelve pence, within clergy.

4 & 5 *W. & M. c. 4. s. 4.* Personating bail before commissioners in the country, within clergy.

5 *W. & M. c. 21. s. 2.* Forging stamps, of duties on parchment, vellum or paper wherein are written law proceedings, excluded clergy.

William the Third.

7 & 8 *W. 3. c. 31. s. 78.* The forgery of Exchequer bills, excluded clergy.

8 & 9 *W. 3. c. 20. s. 36.* Counterfeiting the common seal of the Bank of *England*, or forging their notes, excluded clergy.

8 & 9 *W. 3. c. 26.* perpetuated by 7 *An. c. 25.* Making, mending, or assisting therein, or buying, selling, concealing, or having knowingly in possession, any implements of coinage specified in acts; or other tools or instruments proper only for the coinage of money; or conveying same out of the king's mint, with their counsellors, procurers, aiders, and abettors; or marking any coin on the edges, with letters or otherwise, in imitation of those used in the mint; or casing, gilding, or colouring any coin or round blanks of metal, treason.

8 & 9

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8 & 9 *W. 3. c. 26. f. 6.* Blanching copper, or putting off counterfeit money, within clergy.

9 *W. 3. c. 2. f. 3.* Forging Exchequer bills, excluded clergy.

9 & 10 *W. 3. c. 25. f. 59.* Counterfeiting stamp marks, granted on law proceedings on parchment, &c. granted by this clause of the act, excluded clergy.

10 & 11 *W. 3. c. 23.* Robbery in dwelling houses, shops, warehouses, coach-houses, or stables, and accessaries before the fact, excluded clergy. See 8 *Mod. Rep.* 165. *Fost. Cr. Law*, 77.

10 & 11 *W. 3. c. 23. f. 2.* Apprehenders of burglars, and shoplifters, to have certificates to discharge them from parish offices.

10 & 11 *W. 3. c. 23. f. 5.* Burglars and shoplifters, discovering their accomplices, &c. to be pardoned.

10 & 11 *W. 3. c. 23. f. 7.* Drawing bill of indictment, two shillings.

11 & 12 *W. 3. c. 7.* Robberies committed by the king's subjects, under commissions from foreign princes, or mariners mutinying, and accessaries before the fact, in some cases, excluded clergy.

Anne.

1 *An. c. 9.* Standing mute, or not answering directly, excluded clergy.

1 *An. st. 2. c. 9.* Officers, &c. destroying ships wilfully, excluded clergy.

1 *An. st. 2. c. 9. f. 5.* Offences committed at sea, may be tried, as directed by commission, and person standing mute, &c. to suffer death.

1 *An.*

1 *An. st. 2. c. 17.* Endeavouring to hinder the succession, treason

2 & 3 *An. c. 20. s. 35.* Officers or soldiers upon or beyond sea, raising mutiny, resisting, or disobeying superior, within clergy.

5 *An. c. 6.* Felons may be burnt in the hand, and committed to hard labour.

5 *An. c. 13.* Forgery of Exchequer bills, excluded clergy.

5 *An. c. 31.* Apprehenders of burglars and shoplifters, intitled to forty pounds reward, on tendering certificate of conviction.

5 *An. c. 31. s. 4.* Felon discovering and convicting two accomplices, intitled to pardon.

5 *An. c. 31. s. 5.* Buying or receiving stolen goods, within clergy.

5 *An. c. 31. s. 7.* Judges to settle rights and shares of persons intitled to certificates.

6 *An. c. 7.* Maintaining by writing or printing the right to the crown, than according to the act of settlement, treason.

7 *An. c. 21. s. 10.* After death of pretender no treason to extend to disinherittance, &c. See *stat. 17 Geo. 2. c. 39.*

8 *An. c. 9. s. 41.* Forgery of new stamps or receipts for money payable on apprentices their indentures, excluded clergy.

9 *An. c. 11. s. 44.* Counterfeiting the mark on leather, excluded clergy.

9 *An. c. 16.* Attempting to kill, or striking or wounding any of the privy council, in the execution of their office, excluded clergy.

9 *An. c. 21. sect. 57.* Counterfeiting common seal of *South-sea* company, or forging their bonds, receipts, or warrants for dividends, excluded clergy.

9 *An.*

Of publick Offences.

9 *An. r. 23. f. 34.* Counterfeiting marks on stamps, on parchment, &c, granted by this act, excluded clergy.

10 *An. c. 19. f. 97.* Counterfeiting the mark on linen, excluded clergy.

10 *An. r. 19. f. 115.* Forging stamps on proceedings, cards, dice, &c, granted by this act, excluded clergy.

10 *An. c. 19. f. 63.* The like offence and punishment, as by sect. 115, of the same statute.

10 *An. c. 26. f. 72.* Forging stamps on policy of assurance, excluded clergy.

12 *An. c. 2.* Forging lottery orders, excluded clergy.

12 *Ann. c. 7.* Burglary, or breaking into a dwelling house, in the night time; robbery in dwelling house, shop, warehouse, coach-house, or stable, excluded clergy.

12 *An. st. 2. c. 18. f. 5.* Making holes in ships in distress, or stealing pumps, excluded clergy.

George the First.

1 *Geo. 1. st. 2. c. 5. f. 1.* Rioters assembled to the number of twelve, and not dispersing themselves, within one hour after proclamation, excluded clergy.

1 *Geo. 1. st. 2. c. 5. f. 4.* Pulling down buildings, excluded clergy.

1 *Geo. 1. st. 2. c. 6. f. 4.* Hindering proclamation being made, excluded clergy.

3 *Geo. 1. c. 8. f. 40.* Forging Exchequer bills, excluded clergy.

4 *Geo.*

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4 Geo. 1. c. 2. Transported felons returning before the expiration of their time, excluded clergy.

4 Geo. 1. c. 2. f. 4. Taking reward to help to stolen goods, (if he do not apprehend offenders) in certain specified cases; within clergy.

4 Geo. 1. c. 2. f. 6. Unlawful exporters of wool or woollen manufactures, returning after transportation, excluded clergy.

4 Geo. 1. c. 12. Piracy; or officers, &c. wilfully destroying ships, excluded clergy.

5 Geo. 1. c. 2. f. 9. Counterfeiting the marks on leather, excluded clergy.

5 Geo. 1. c. 3. Forgery of lottery orders, excluded clergy.

5 Geo. 1. c. 14. f. 10. Forging debentures, excluded clergy.

6 Geo. 1. c. 4. f. 56. Counterfeiting the common seal of the *South-sea*, or forging the company's bonds, receipts, or warrants for dividends, excluded clergy.

6 Geo. 1. c. 4. f. 91. Forging Exchequer bills, excluded clergy.

6 Geo. 1. c. 2. f. 50. Counterfeiting the common seal of the *South-sea* company, or forging their bonds, receipts, or warrants for dividends, excluded clergy.

6 Geo. 1. c. 18. f. 13. Forging policies of Royal Exchange, and *London Assurance* companies, excluded clergy.

6 Geo. 1. c. 11. f. 35. Persons convicted of perjury; or assault with intent to rob; or entering black lead mines; or of wounding custom house officers; returning from transportation, excluded clergy.

6 Geo.

Of publick Offences.

6 Geo. 1. c. 21. s. 60. Accessories before the fact, to forging stamps, excluded clergy.

6 Geo. 1. c. 23. Transported felons returning before the expiration of time, excluded clergy.

6 Geo. 1. c. 23. s. 5. Rescuing convicts from transportation, excluded clergy.

6 Geo. 1. c. 23. s. 9. Felon discovering and convicting two accomplices, intitled to some certificate, as for apprehending highwaymen. See Stat. 10 & 11. Wil. 3. c. 23. s. 2.

6 Geo. 1. c. 23. s. 2. Assaulting persons with intent to tear or spoil their cloaths, within clergy.

7 Geo. 1. c. 3. Not performing quarentine, excluded clergy.

8 Geo. 1. c. 8. Not performing quarentine, excluded clergy.

8 Geo. 1. c. 18. Smugling, excluded clergy.

8 Geo. 1. c. 18. s. 6. Running goods, five in company armed; and convicts transported, returning before expiration of their time, excluded clergy.

8 Geo. 1. c. 22. Forging authority to transfer stock, or personating proprietor, excluded clergy.

8 Geo. 1. c. 24. Trading in piracy, accessories before the fact in some cases, excluded clergy.

9 Geo. 1. c. 5. Forging Exchequer bills, excluded clergy.

9 Geo. 1. c. 12. s. 4. Forging orders for payment of annuities, or personating proprietor, excluded clergy.

9 Geo. 1. c. 22. perpetuated by 31 Geo. 2. c. 42. Hunting armed and disguised; killing or stealing deer; robbing warrens; stealing fish

fish out of a river; unlawfully hunting in royal forests; breaking down head of fish ponds; killing, &c. cattle; cutting down trees; setting fire to house, barn, or wood; shooting at any person; sending anonymous letters, or with fictitious name demanding money, &c. or threatening, or rescuing offenders, excluded clergy.

9 Geo. 1. c. 22. f. 4. Proclamation for offenders to surrender, to be printed in the *Gazette*.

9 Geo. 1. c. 22. f. 12. Justices to give certificate to persons wounded, or to executors of persons killed, in apprehending felons.

9 Geo. 1. c. 28. Opposing the execution of process, in any pretended privileged place, without clergy.

9 Geo. 1. c. 28. f. 3. Persons disguised, abetting rioters, who oppose the execution of process, in pretended privileged places, without clergy.

11 Geo. 1. c. 9. Opposing the execution of process in any privileged place, without clergy.

11 Geo. 1. c. 9. f. 6. Counterfeiting the common seal of the company of the Bank of *England*; or forging bank bills, bank notes, or indorsements, without clergy.

11 Geo. 1. c. 17. f. 6. Forging Exchequer bills, excluded clergy.

11 Geo. 1. c. 22. Opposing the execution of process, in any pretended privileged place, within clergy.

11 Geo. 1. c. 29. Officers, &c. wilfully destroying ships, excluded clergy.

12 Geo. 1. c. 32. f. 9. Forging bond of accountant general, register, clerk of the report office, or any of the cashiers of the Bank, or any

Of publick Offences.

East India bond, common seal of *South-sea* company, their bonds, receipts, or warrants for dividends, excluded clergy.

12 *Geo.* 1. c. 34. f. 6. Servant assaulting master woolcomber or weaver, within clergy.

12 *Geo.* 1. (1) c. 34. f. 7. Destroying woollen goods, racks, or tools, excluded clergy.

12 *Geo.* 1. c. 36. f. 3. Destroying *Fulham* bridge, excluded clergy.

George the Second.

1 *Geo.* 2. c. 13. Not performing quarentine, excluded clergy.

1 *Geo.* 2. st. 2. c. 19. Demolishing locks, sluices, or flood gates, within clergy.

2 *Geo.* 2. c. 6. f. 10. Sound persons entering lazaret, and escaping before they have performed quarentine, excluded clergy.

2 *Geo.* 2. c. 6. f. 17. Superintendant of quarentine neglecting duty, or concealing or clandestinely conveying letters or goods, excluded clergy.

2 *Geo.* 2. c. 25. f. 1. (perpetuated by 9 *Geo.* 2. c. 18.) Forgery of deeds, wills, bill of exchange, promissory note of hand, indorsement, or receipt, and accessaries before the fact, excluded clergy. See *Fost. Cr. Law*, 116.

2 *Geo.* 2. c. (2) 25. f. 2. Persons in custody for perjury, or ordered for transportation, breaking prison, or returning from transportation, excluded clergy.

(1) Stat. 22 *Geo.* 3. c. 9. extends the act to the intent, with certain overt act.

(2) Penalties of the act extended to all the public funds since established by act of parliament. See Stat. 31 *Geo.* 2. c. 22. f. 80.

2 *Geo.*

2 Geo. 2. c. 25. f. 3. Stealing exchequer orders, tallies, or other orders, intitling persons to annuity or share in parliamentary fund, or stealing exchequer bills, bank notes, *South-sea* bonds, *East India* bonds, dividend warrants of Bank, *South-sea*, *East India*, or other company, bills of exchange, navy bills, debentures, goldsmiths notes, or other bonds or warrants, bills, or promissory notes; excluded clergy.

3 Geo. 2. c. 35. f. 28. Persons convicted of wounding custom house officer, returning from transportation, excluded clergy.

4 Geo. 2. c. 16. Stealing linen, or fustian from bleaching grounds, excluded clergy.

4 Geo. 2. c. 18. Forgery of *Mediterranean* passes, excluded clergy.

4 Geo. 2. c. 32. Stealing iron bars, or lead fixed to buildings, within clergy.

4 Geo. 2. c. 32. f. 3. Receivers of such stolen property, within clergy.

5 Geo. 2. (1) c. 30. f. 1. Bankrupt not surrendering, or not submitting to be examined, or concealing or embezzling, to the value of 20*l.* excluded clergy.

6 Geo. 2. c. 23. f. 2. Assaulting persons, with intent to tear, or spoil their cloaths, within clergy.

6 Geo. 2. c. 34. Not performing quarentine, excluded clergy.

6 Geo. 2. c. 37. f. 5. (perpetuated by Stat. 31 Geo. 2. c. 42.) Destroying banks, excluded clergy.

6 Geo. 2. c. 37. f. 6. Cutting hop-binds, excluded clergy.

(1) Continued to 29 Sept. 1788, by Stat. 26 Geo. 3. c. 80.

Of publick Offences.

7 Geo. 2. c. 21. s. 1. Assaulting persons with intent to rob them, within clergy.

7 Geo. 2. c. 21. s. 2. Offenders committed, or ordered to be transported, for assaulting on the highway, with intent to rob, breaking prison, or returning from transportation, excluded clergy.

7 Geo. 2. c. 22. Forging acceptance of bills of exchange, or accountable receipt, warrant or order for payment of money, or delivering of goods, and accessaries before the fact, excluded clergy.

8 Geo. 2. c. 6. s. 31. Second offence of forging entry of acknowledgement of bail, or of bargain and sale, in registry of York, excluded clergy.

8 Geo. 2. c. 20. (perpetuated by stat. 27 Geo. 2. c. 16.) Destroying turnpikes, locks, sluices, or flood-gates, excluded clergy.

9 Geo. 2. c. 29. s. 5. Destroying *Westminster* bridge, excluded clergy.

9 Geo. 2. c. 30. Inlisting soldiers, or causing others to enlist into foreign service, excluded clergy.

9 Geo. 2. c. 34. s. 8. Forging order for payment of annuities, or personating proprietor, excluded clergy.

9 Geo. 2. c. 35. s. 7. Persons liable to transportation for offences against the customs, offending again, after having taken the benefit of the indemnifying act, excluded clergy.

9 Geo. 2. c. 35. s. 10. Three persons armed, assembling to run goods, within clergy.

9 Geo. 2. c. 35. s. 28. Persons transported for assisting in running of goods, returning from transportation, excluded clergy.

10 Geo.

10 Geo. 2. c. 31. f. 9. Watermen carrying greater number of passengers than allowed by law, if any passenger be drowned, within clergy.

10 Geo. 2. c. 32. (perpetuated by Stat. 31 Geo. 2. c. 42.) Firing collieries, excluded clergy.

10 Geo. 2. c. 32. f. 7. Second conviction for hunting and taking away, or for coming armed into a forest, with intent to steal deer, excluded clergy.

11 Geo. 2. c. 22. Second offence of destroying granaries, within clergy.

11 Geo. 2. c. 22. f. 2. Persons convicted of destroying granaries, returning from transportation, excluded clergy.

11 Geo. 2. c. 26. f. 2. Convicts against the acts concerning spirituous liquors, within clergy.

11 Geo. 2. c. 26. f. 2. Rescuing offenders against the acts concerning spirituous liquors, within clergy.

11 Geo. 2. (1) c. 34. Second offences for firing engines, for draining marshes, excluded clergy.

12 Geo. 2. c. 21. f. 26. Opposing officers of excise, customs, &c. in seizing wool, excluded clergy.

14 Geo. 2. c. 6. Sheep-stealing, and accessories before the fact; excluded clergy.

(1) By Stat. 22 Geo. 2. c. 2, 16, & 19. 29 Geo. 2. c. 22. 30 Geo. 2. c. 32, 33, 35, & 36. 31 Geo. 2. c. 18. 32 Geo. 2. c. 13. & 33 Geo. 2. c. 32. Offenders maliciously setting fire to any of the works for draining the several fens, to which these acts relate, may be transported for seven years.

Of publick Offences.

14 *Geo. 2. c. 24.* Second offence of firing engines, for draining marshes, excluded clergy. See note to 11 *Geo. 2. c. 34.*

15 *Geo. 2. c. 2. f. 2, 3.* Third offence of uttering false money, excluded clergy.

15 *Geo. 2. c. 12. f. 2.* Forging the common seal of the bank of *England*, or bank notes, excluded clergy.

15 *Geo. 2. c. 12. f. 12.* Officer or servant of the bank, secreting or embezzling notes, excluded clergy.

15 *Geo. 2. c. 27.* Third offence of stealing cloth or wool left to dry, off the tenters, &c. within clergy; persons transported for stealing it from the rack, returning before the expiration of limited time, excluded clergy.

15 *Geo. 2. c. 34.* Stealing bull or cow, excluded clergy.

15 & 16 *Geo. 2. c. 28.* Colouring, or altering a shilling or sixpence, to make them respectively resemble a guinea or half guinea, or halfpenny or farthing, to make them respectively resemble a shilling or sixpence, treason.

16 *Geo. 2. c. 15.* Convicts for assault with intent to rob, being transported, or breaking gaols, or escaping, or any transported felons returning within the time, excluded clergy.

16 *Geo. 2. c. 31.* Assisting persons committed for high treason, or felony, (except petty larceny,) to attempt an escape, within clergy. Persons transported for assisting prisoners to escape, returning before the expiration of time, excluded clergy.

17 *Geo. 2. c. 5. f. 9.* Incorrigible rogues, breaking out, or escaping from the house of correction, or offending second time; within clergy.

17 *Geo. 2. c. 39.* Maintaining that the parliament cannot change the succession, or the sons of the Pretender landing or attempting to land in this kingdom; or being found in *Great Britain, Ireland*, or any of the dominions, treason.

18 *Geo. 2. c. 27.* Stealing linen or fustian from bleaching grounds, and accessories before the fact, in stealing cotton therefrom, excluded clergy.

18 *Geo. 2. c. 28. f. 7.* Same offence, as by Stat. 9 *Geo. 2. c. 35. f. 7.* excluded clergy, excluded therefrom by this act.

19 *Geo. 2. c. 34. f. 1.* Persons assembled armed for running goods, excluded clergy.

19 (1) *Geo. 2. c. 34. f. 3.* Harbouring offenders against the laws of customs, within clergy.

20 *Geo. 2. c. 22.* Destroying *Walton* bridge, within clergy.

20 *Geo. 2. c. 46. f. 1.* Rebels pardoned, returning from transportation, or going into the dominions of *France* or *Spain*, excluded clergy.

20 *Geo. 2. c. 46. f. 2.* Persons aiding rebels for such purposes, excluded clergy.

20 *Geo. 2. c. 46. f. 3.* Holding correspondence with rebels, or with persons employed by them, by letters or otherwise, excluded clergy.

21 *Geo. 2. c. 18.* Second offence of firing engines, for draining marshes, excluded clergy. See note to 11 *Geo. 2. c. 34.*

23 *Geo. 2. c. 37. f. 2.* Destroying *Hampton Court* bridge, within clergy.

(1) Continued to 29 *Sept. 1788*, by Stat. 26 *Geo. 3. chap. 80.*

Of publick Offences.

24 Geo. 2. c. 2. s. 3. Embezzlement of the effects of the *South-sea* company, by their officer or servant, excluded clergy.

24 Geo. 2. c. 36. Destroying *Ribble* bridge, within clergy.

24 Geo. 2. c. 40. s. 28. Offenders against the acts concerning spirituous liquors, or rescuing them; within clergy.

24 Geo. 2. c. 45. Robbery on board any vessel or wharf to the value of forty shillings, and accessories before the fact, excluded clergy. See *Fost. Cr. Law*, 79. n.

24 Geo. 2. c. 73. Destroying *Wyde* bridge, within clergy.

25 Geo. 2. c. 10. s. 1. Entering mines of black lead, with intent to steal, within clergy, such offenders committed or transported, escaping, breaking prison, or returning from transportation, excluded clergy.

25 Geo. 2. c. 36. s. 2. Court may order expences of prosecuting felons, to be paid by the treasurer of the county.

25 Geo. 2. c. 37. s. 9. Rescuing any person found guilty of, or committed for murder, or going to, or during execution, excluded clergy.

25 Geo. 2. c. 37. s. 10. Rescuing the corps of an executed murderer, within clergy.

25 Geo. 2. c. 37. s. 10. Persons convicted for rescuing the corpses of murderers, from sheriff or surgeon, returning from transportation, excluded clergy.

26 Geo. 2. c. 6. Not performing quarentine, excluded clergy.

26 Geo. 2. c. 6. s. 2. Masters of ships offending against directions of the act, excluded clergy.

26 Geo.

26 Geo. 2. c. 6. f. 3. Concealing having infected persons on board, excluded clergy.

26 Geo. 2. c. 6. sect. 8. Refusing to perform quarentine, excluded clergy.

26 Geo. 2. c. 6. f. 10. Sound persons entering lazaret, before having performed quarentine, excluded clergy.

26 Geo. 2. c. 6. f. 17. Superintendant of quarentine, neglecting his duty, excluded clergy.

26 Geo. 2. c. 6. f. 18. Concealing or clandestinely conveying letters or goods from aboard infected ships, excluded clergy.

26 Geo. 2. c. 19. Plundering shipwrecked goods, beating with intent to kill, otherwise obstructing escape of person from such ships; or putting out false lights, with intent to bring ships in danger, excluded clergy.

26 Geo. 2. c. 33. f. 8. Solemnizing marriage clandestinely, within clergy.

26 Geo. 2. c. 33. f. 16. Forging marriage register or license, excluded clergy.

27 Geo. 2. c. 3. f. 3. The expences of the attendance of poor persons, of prosecuting a felon, may be ordered by court, to be paid them by treasurer of the county.

27 Geo. 2. c. 15. Sending threatening letters, or rescuing such offenders, excluded clergy.

27 Geo. 2. c. 19. Destroying any of the works in Bedford level, excluded clergy. See note to 11 Geo. 2. c. 34.

28 Geo. 2. c. 6. f. 3. Concealing the having infected persons on board ships having the plague, excluded clergy.

28 Geo. 2. c. 13. f. 17. Perjury of prisoners, under insolvent acts, excluded clergy.

28 Geo.

Of publick Offences.

28 Geo. 2. c. 13. f. 39. Insolvent debtors refusing to deliver up their effects, or concealing same to 20 l. value, excluded clergy.

28 Geo. 2. c. 55. Destroying *Sandwich* bridge, within clergy.

29 Geo. 2. c. 12. f. 21. Counterfeiting stamps on beer licenses excluded clergy.

29 Geo. 2. c. 13. f. 5. Forging stamp of additional duties granted by this act, excluded clergy.

29 Geo. 2. c. 17. Accepting commission from the *French* king, continuing in the *French* service, after 29th Sept. 1757, or contracting to inlist into foreign service, excluded clergy.

29 Geo. 2. c. 30. Buying or receiving lead, iron, copper, &c. knowing it to be stolen, within clergy.

29 Geo. 2. c. 30. f. 31. Penalties on having lead, copper, brass, metal, or solder, without being able to account for having them.

29 Geo. 2. c. 40. f. 6. Destroying *London* bridge, excluded clergy.

29 Geo. 2. c. 75. f. 73. Destroying *Wey* bridge, within clergy.

29 Geo. 2. c. 86. Destroying *Black Friars* bridge, within clergy.

30 Geo. 2. c. 3. f. 156. Forgery of Exchequer bills, excluded clergy.

30 Geo. 2. c. 19. f. 27. Counterfeiting stamps directed by this or any former act, excluded clergy.

30 Geo. 2. c. 59. Destroying *Jeremy's* ferry-bridge, within clergy.

30 Geo. 2. c. 63. f. 19. Destroying *Old Brentford* bridge within clergy.

31 Geo. 2. c. 10. f. 6. Wilfully damaging *London* bridge, and accessaries before the fact, excluded clergy.

31 Geo.

31 Geo. 2. c. 10. Taking false oath in order to obtain letters of administration to seamen, excluded clergy. See *Loft's Rep.* 321.

31 Geo. 2. c. 10. s. 24. Personating seamen, in order to receive their pay, excluded clergy.

31 Geo. 2. c. 32. s. 15. Forging stamp for marking gold and silver, excluded clergy.

31 Geo. 2. c. 46. Destroying Old *Brentford* bridge, within clergy.

31 Geo. 2. c. 59. Destroying *Trent* bridge, within clergy.

32 Geo. 2. c. 14. c. 9. Forging the hand of the receiver of præfines, excluded clergy.

32 Geo. 2. c. 35. s. 17. Forging marks of stamp, denoting the additional duties imposed by this act, excluded clergy.

33 Geo. 2. c. 1. s. 136. Forging Exchequer bills, excluded clergy.

George the Third.

1 Geo. 3. c. 17. s. 46. Insolvent debtor concealing his effects, or refusing to deliver them up, to the value of twenty pounds, excluded clergy.

2 Geo. 3. c. 36. s. 8. Forging stamps on admissions, &c. into Inns of Court, excluded clergy.

4 Geo. 3. c. 37. Breaking into shop to destroy linen, yarn, implements, silks, goods or tools, excluded clergy. See *Stat.* 22 Geo. 3. c. 40.

4 Geo. 3. c. 37. s. 26. Counterfeiting the marks on linen, excluded clergy.

5 Geo. 3. c. 25. Stealing letters from the post-office, or robbing the mail, excluded clergy.

5 Geo.

Of publick Offences.

5 *Geo. 3. c. 35. f. 6.* Forgery of stamps for additional duties on policies of assurance, excluded clergy.

5 *Geo. 3. c. 46. f. 40.* Forgery of stamps on vellum, parchment, cards, &c. excluded clergy.

5 *Geo. 3. c. 47. f. 8.* Forgery of stamps of additional duties, on vellum, parchment, or paper, or vending forged stamps, excluded clergy.

7 *Geo. 3. c. 40. f. 32.* Destroying toll gates, weighing engines, &c. excluded clergy.

7 *Geo. 3. c. 50.* Officers secreting or destroying letters containing bank notes, or stealing them out, or robbing the mail, excluded clergy.

9 *Geo. 3. c. 29. f. 1, 2.* Riotous assembling and destroying mills, excluded clergy.

9 *Geo. 3. c. 29. f. 3.* Destroying fences set up by act of parliament, for enclosing common or waste lands, within clergy.

9 *Geo. 3. c. 30. f. 6.* Forging seamen's tickets, wills, &c. excluded clergy.

10 *Geo. 3. c. 48.* Receiving jewels or plate, knowing them to be stolen, within clergy.

11 *Geo. 3. c. 40. f. 2.* Receiving or paying counterfeit copper money, within clergy.

12 *Geo. 3. c. 20.* Standing mute, conviction.

12 *Geo. 3. c. 24.* Burning or otherwise destroying ships, docks, &c. buildings in dockyards, or military stores, excluded clergy.

12 *Geo. 3. c. 48.* Committing frauds on the stamp duties on vellum, parchment, or paper, or cards, within clergy.

13 *Geo. 3. c. 56.* Counterfeiting the stamps on silks, callicoes, linens, or stuffs, printed in Great Britain, excluded clergy.

13 *Geo.*

13 *Geo. 3. c. 79. f. 1.* Making, using, or having in possession, moulds for making paper with the words, "*Bank of England*," visible in the substance, excluded clergy.

14 *Geo. 3. c. 72. f. 8.* Forgery of stamps on *British* manufactured printed cottons, or selling them, excluded clergy.

16 *Geo. 3. c. 34. f. 15.* Forgery of additional stamps on parchment, cards, dice or newspapers, excluded clergy.

16 *Geo. 3. c. 43.* Males convicted in *England*, of crimes punishable by transportation to *America*, may, instead thereof, be kept to hard labour, in clearing the river *Thames*, &c. for any term not less than three, nor more than ten years.

17 *Geo. 3. c. 50. f. 23.* Counterfeiting stamp mark on parchment deeds, excluded clergy.

18 *Geo. 3. c. 18.* Forging acceptance of bills of exchange to defraud corporations, excluded clergy.

20 *Geo. 3. c. 28. f. 6.* Forging stamps on receipts for legacies, excluded clergy.

21 *Geo. 3. c. 56. f. 9.* Counterfeiting almanac stamp, or selling same knowingly, marked with such stamp, excluded clergy.

22 *Geo. 3. c. 33. f. 6.* Forging stamps for duties on inland bills of exchange, promissory, or other notes, or uttering same, excluded clergy.

22 *Geo. 3. c. 42. f. 25.* Wilfully obstructing the building of *Ealing* bridge, or destroying it, or attempting so to do, within clergy.

23 *Geo. 3. c. 49. f. 20.* Forging stamps on receipts, or uttering, or using same, excluded clergy.

23 *Geo.*

Of publick Offences.

23 Geo. 3. c. 50. f. 10. Forging name of paymaster, or deputy, for obtaining money of bank, excluded clergy.

23 Geo. 3. c. 58. f. 11. Counterfeiting stamps directed to be used by this or any act of parliament; or uttering, vending, or fraudulently using same, excluded clergy.

23 Geo. 3. c. 62. f. 11. Counterfeiting stamps or marks for quack medicines, excluded clergy.

23 Geo. 3. c. 70. Excise officer granting false, or receiving goods, knowing them to be brought under false permits, within clergy.

23 Geo. 3. c. 70. f. 9. Making moulds for permits, or assisting, or forging them, excluded clergy.

24 Geo. 3. c. 5. Transported felons returning before expiration of time, excluded clergy.

24 Geo. 3. c. 15. f. 15. Forgery of stamps for the hat duty, or fraudulently using same, excluded clergy.

24 Geo. 3. c. 27. f. 13. Harboursing the smugglers described in the act, after the time appointed for their surrender.

24 Geo. 3. c. 40. f. 35. Counterfeiting stamps for duties on linens, cottons, and linens mixed, excluded clergy.

24 Geo. 3. c. 43. f. 16. Counterfeiting seal, forging stamp or mark for game certificates, or fraudulently using same, excluded clergy.

24 Geo. 3. c. 47. Shooting at officers of navy, customs, or excise, excluded clergy.

24 Geo. 3. c. 53. f. 16. Counterfeiting plate mark, or selling, exporting, or exchanging any plate, knowingly with false mark, or bearing any such mark or stamp, excluded clergy.

24 Geo.

24 Geo. 3. c. 47. s. 13. Harboursing offenders against the customs, in the act specified, or not surrendering, after order so to do, excluded clergy.

25 Geo. 3. c. 48. s. 12. Counterfeiting stamp on pawnbroker's license, without clergy.

The punishments and forfeitures of criminals are as follows, viz.

Punishment
for high
treason.

IF a peer commit treason he shall be only beheaded, which is part of the judgment, and the king commonly pardons the rest. The judgment in all cases of high treason (except for counterfeiting the coin) is that the offender shall be drawn on a hurdle or sledge to the place of execution, and there be hang'd by the neck, to be cut down alive, his privy members cut off, his bowels ript up, taken out and burnt before his face, his head severed from his body, and his body divided into four quarters, which are to be disposed of as the king shall think fit.

Punishment
in petit
treason.

For counterfeiting the coin, the offender is to be drawn and hang'd: and the judgment in petit treason is for a man to be drawn and hanged; and for a woman to be drawn and burnt.

The

Of publick Offences.

The criminal for treason shall forfeit all his lands, tenements and hereditaments, which he had at the time of the treason committed, or afterwards, the right of others saved; See *stat. 26 Hen. 8. c. 13. s. 5.* and all his goods and chattels shall be forfeited from the time of the conviction. Also his blood shall be corrupted, on attainder, and his children be incapable to inherit to him or any of his ancestors.

For murder, felony and larceny above 12 *d.* a man or woman is to be hanged by the neck 'till dead; and in extraordinary cases, where a barbarous murder is committed, the body of the offender is usually hanged in chains. And see *stat. 25 Geo. 2. c. 37.*

In case of murder, burglary, robbery, and all felonies for which offenders shall suffer death, they shall forfeit all their lands in fee-simple, and goods and chattels. The king shall have goods of felons, and year, day and waste in their lands; which afterwards escheat to the lord of the manor of whom held: for standing mute in cases of felony, goods and chattels are forfeited.

For manslaughter, where the offender is admitted to his clergy, he shall be burnt in the hand.

In

Forfeiture. { In manslaughter, chance med-
ley, and *se defendendo*, an offen-
der forfeits his goods and chat-
tels; but in the two last he has
pardon of course.

Punishment { Here the punishment is whip-
of *petit lar-* ping, or transportation for seven
ceny, &c. years, &c.

Forfeiture. { And in petit larceny, goods are
forfeited; so also for flight in fe-
lony, &c.

Where an offence made penal by statute, is, in it's nature single; one single penalty only can be recovered; though several join in committing it; but if the offence be in it's nature several, each offender is separately liable to the penalty. *Cowp. Rep. 610.*

A person can commit but one offence on one day, by exercising his ordinary calling on a Sunday. *Cowp. Rep. 640.*

Goods of felon vested in crown by forfeiture, not subject to felon's debts. *Dougl. Rep. 545, 546.*

CONSTITUTIONAL HISTORY

The first of the main principles of the constitution is that of the separation of powers. This principle is based on the idea that the different branches of government should have distinct and separate functions, so that no one branch becomes too powerful.

The second principle is that of the supremacy of the law. This means that everyone, including the government, is subject to the law. The law is the highest authority in the land, and no one is above it.

The third principle is that of the protection of individual rights. The constitution guarantees certain rights to every citizen, such as the right to life, liberty, and property. These rights are protected by the law, and no one can take them away from you.

These three principles are the foundation of the constitution. They are the ideas that guide the government and the people. Without these principles, the government would be a tyranny, and the people would have no rights.

The constitution is a living document. It is not a set of rules that are fixed for ever. It is a set of principles that guide the government and the people. As the society changes, the constitution must also change to meet the needs of the people.

The constitution is the heart of the government. It is the source of all power. It is the law that governs the government and the people. It is the foundation of the nation. Without the constitution, the nation would be a chaos.

THE END

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